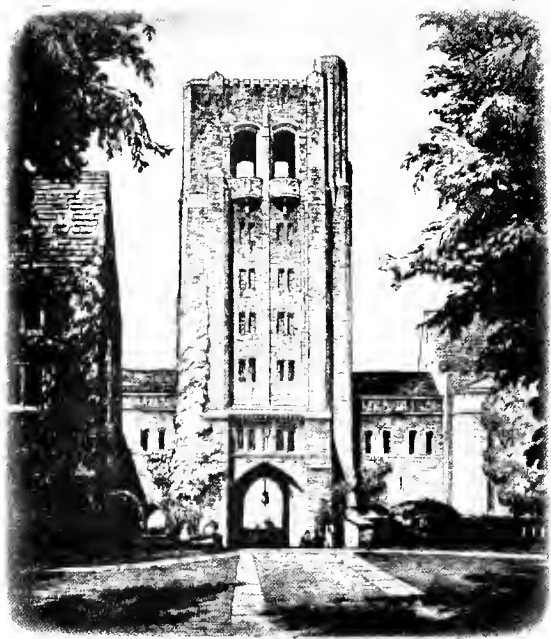






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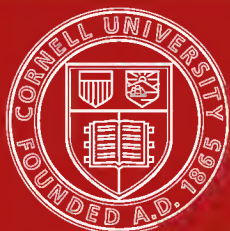
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A TREATISE

On the Law of

Independent Contractors

And

Employers' Liability

Including

Formation of the Relation

Employers' General and Exceptional Liability

*Interliability of Employers and Contractors
and their Subordinates*

By

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PREFACE

The increasing number of cases involving liability growing out of the relation of Independent Contractor and the corresponding importance of the subject seem to justify a separate treatise on that subject. In the 110 years that have elapsed since the leading case of *BUSH v. STEINMAN* was decided, more than fifteen hundred cases bearing more or less on the law of Independent Contractor have been passed upon, the great majority of these within the past twenty-five years. So far there has been no separate text on the subject, although Judge Thompson devoted to it a number of sections of his Commentaries on Negligence and Mr. C. B. Labatt has written several very excellent and exhaustive monographic notes along the same lines. To these the author acknowledges very material assistance in the preparation of the present volume.

The subject is naturally divided into a discussion of (1) The Relation of Independent Contractors; (2) The General and Exceptional Liability of the Employer to Third Persons, and (3) The Interliability of Employers and Independent Contractors and the Subordinates of each. These subdivisions are treated in the order given.

Cross references are given to the National Reporter System and to all the current general, and to many of the special, leading-case publications, to which are added, parenthetically, the years in which the various cases were decided. Those cases which the author considers the leading ones, as to Independent Contractors, are set out in small capitals.

In the hope that his effort will be of some service to the profession and craving their indulgence for any imperfections, the author submits this volume.

THEOPHILUS J. MOLL.

INDIANAPOLIS, December 1, 1909.

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- 32. Same—Burden of proof, on whom.
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SECTION

- 36. Same—Relation determined by statute.
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- 38. Particular instances of independent contractors.
- 39. Effect of death as test.

Sec. 1. Representation.

“Legal obligations are either primary antecedent obligations (imposed either by one’s voluntary undertaking or by the law, irrespective of one’s volition, upon grounds of public policy or utility) or secondary substituted obligations (arising from an act or omission resulting in a breach of a primary obligation). . . . Most of the things which a man may do in person he may do through a representative; accordingly, through a representative he may create a voluntary primary obligation, or he may commit a breach of a primary obligation and thus impose on himself a secondary substituted obligation. Representation, therefore, is of great importance in the law of obligation. It creates a subsidiary range of obligation differing from the main range only in the fact that the one obliged acts mediately through a representative instead of immediately in person.”¹ “The Statute of Westminster II, Ch. 35, as if voicing a principle of universal law, recites that one person shall not be punished for the act of another. . . . Henceforth no one was to be held answerable for an act unless he himself could be brought into some sort of connection with the wrong.”² “The vicarious principle by which the master was in early times held absolutely responsible for the tortious acts of his servant having passed away, there followed a period of

¹ Huff. Agcy., 2nd ed., Sec. 1-3, abridged.

² 2 Street Legal Liab., 440.

Independent Contractors and Their Liability.

CHAPTER I.

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28. Same—Same—Question for court.
29. Same—Same—Question for jury.
30. Same—Identity of employer and independent contractor.
31. Same—Whose servant the wrongdoer is.

sentative to doing? What end does he intend for him to accomplish? What means are proper to be used in executing the purpose?"⁶ "The two branches of the law are intimately connected, and there never has been a time when cases on master and servant were not cited as authority in the law of principal and agent, and *vice versa*."⁷ "It must always be borne in mind that the law of principal and agent is merely a branch of the broader doctrine of master and servant and a common principle underlies both."⁸

Sec. 3. Agent Defined.

"In the common language of life, he who being competent and *sui juris* to do any act for his own benefit or on his own account, employs another person to do it, is called the principal, constituent or employer; and he who is thus employed, is called the agent, attorney, proxy or delegate of the principal, constituent or employer. The relation thus created between the parties is termed an agency."⁹ An agent is a representative vested with authority, real or ostensible, to create voluntary primary obligations for his principal, by making contracts with third persons, or by making promises or representations to third persons calculated to induce them to change their legal relations.¹⁰

Sec. 4. Master and Servant Defined.

A master is one who stands to another in such a relation that he not only controls the result of the work of that other, but also may direct the manner in which such work shall be done.¹¹ A servant is a representative vested with

⁶ 2 Street Legal Liab., 453.

⁷ Id. 454, citing article on "Agents and Servants Essentially Identical," by C. C. Allen, 28 Amer. Law Rev. 9.

⁸ 2 Street Legal Liab. 486, criticising "Estoppel Theory."

⁹ Story Agcy., 9th ed., Sec. 3.

¹⁰ Huff. Agcy., 2nd ed., Sec. 6.

¹¹ 20 Amer. & Eng. Enc. of Law, 2nd ed., 10.

some hundreds of years during which the accepted doctrine was that the master could not be held responsible unless he had consented to the wrongful act or had actually commanded it.”³

Sec. 2. Distinction between Agents and Servants.

“Agency is a term signifying the legal relations established when one man is authorized to and does represent and act for another. The one represented may be comprehensively termed the constituent (specifically, either a principal or master) and the one representing him may be termed the representative (called either an agent or servant). . . . One person may act in the interest of another without being technically his agent or servant. In order, therefore, to delimit our subject, we must first set aside and distinguish these analogous legal relations.”⁴ The fundamental distinctions between the two are to be sought in the nature of (1) the act authorized, (2) the obligation resulting from the performance of the act, (3) the legal test fixing the constituent’s liability for an act in excess of authority.⁵ “There is no substantial difference between the test as formulated in contract and tort. When speaking in the language of the books on master and servant, we say that the master is liable for any act of the servant done in the course of his employment and in furtherance of it. When speaking in accepted terms of the law of principal and agent we say the principal is bound by any contract which the agent makes while acting in the scope of his apparent authority. Both statements amount to the same. In every case the first and fundamental question is, What has the principal (constituent) set his repre-

³ Id. 442.

⁵ Id. Sec. 4, abridged.

⁴ Huff. Agcy., 2nd ed., Sec. 1-3, abridged.

behalf, some one whom the law authorizes to speak for him does so, and the relation established is strictly one resting on an agreement for services in return for a consideration of some sort which the master is to render.¹⁶

Sec. 5. Servants by Estoppel.

However, the employer may estop himself from showing that a mechanic in his employ is an independent contractor, when he holds himself out as master. Thus where the defendant held itself out as practicing dentistry in one of the departments of its store, it was declared liable for the malpractice of the dentists, although they were in fact practicing on their own account.¹⁷ "But this is estoppel to deny the existence of the relation merely. The liability for a tort committed by such ostensible servant is fixed by the ordinary rule applicable to master and servant. Estoppel to deny the existence of the relation could not be invoked where the third person is not thereby induced to change his legal relations or position. . . . Yet one may be estopped to deny that another is his servant where by so representing him third persons have been induced to entrust their person or property to his care or treatment."¹⁸ A father was employed by the defendant company to mine coal at a specified price per ton, and had his boy to assist in the work, with the knowledge and consent of the company. The boy was held to be a servant of the company as respects the duty owed him by the company.¹⁹

¹⁶ Cooley on Torts (Students' ed., 1907), p. 471.

¹⁷ HANNON v. SIEGEL-COOPER Co. (1901), 167 N. Y. 244, 60 N. E. 597; 52 L. R. A. 429. Cf. Sec. 1, n. 5.

¹⁸ Huff. Agcy., 2nd ed., 196, 296, citing HANNON v. SIEGEL-COOPER Co., *supra*.

¹⁹ Ringue v. Oregon, etc., Co. (1904), 44 Ore. 407; 75 Pac. 703.

authority to perform operative acts for his master not creating new primary obligations, or bringing third persons into contractual relations with the master or otherwise causing them to change their legal position. A master comes under obligations to third persons by the act of his servant only when the servant commits a breach of the master's primary obligations and thus creates secondary substituted obligations.¹² "There is high authority for the doctrine that the possession or non-possession of the right of control may, in some instances, determine whether the person employed was a servant or an agent."¹³ "A servant is one who is employed to render personal services to his employer otherwise than in the pursuit of an independent calling."¹⁴ The legal term "servant" is sometimes expressly defined by statute.¹⁵ The case of an apprentice may be embraced under this head; for although he does not always bargain in respect to the services on his own

¹² Huff, *Agcy.*, 2nd ed., Sec. 6.

¹³ Note to *RICHMOND v. SITTERDING*, (1903, 101 Va. 354; 43 S. E. 562; 99 Am. St. Rep. 879; 16 Am. Neg. Rep. 609, n.); in 65 L. R. A. at p. 447. Bramwell, B., is reported as having said: "It seems to me that the difference between the relations of master and servant and principal and agent is this: a principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say *how* it is to be done." *Regina v. Walker* (1858), as reported in 27 L. J. Mag. Cas. (N. S.) 208. Chief Justice Cockburn pertinently asked: "Does not the word 'clerk' or 'servant' imply the existence in some one of a power

of control?" *Regina v. May* (1861), Leigh & C., C. C., 13. In a prosecution for embezzlement, Lord Blackburn said: "The test is very much like this, viz.: whether the person charged is under the control and bound to obey the orders of another." *Regina v. Negus* (1873), L. R. 2 N. C. 37. "A servant is a person subject to the command of his master, as to the manner in which he shall do the work." Bramwell, L. J., in *Yewens v. Noakes* (1880), L. R. 6 Q. B. Div., 532.

¹⁴ *MURRAY v. DWIGHT* (1900), 161 N. Y. 301, 55 N. E. 901; 48 L. R. A., 673.

¹⁵ Calif. Civil Code, Sec. 2009; Dak. Civil Code Sec. 1157; New York Code, Sec. 1034.

the plaintiff and requesting the remittance of a large sum of money. The money was duly sent by express and was intercepted and abstracted by S., who converted it to his own use. The defendant telegraph company was held liable.²⁴

Sec. 7. Transfer of Service.²⁵

When the servants of one person are hired or loaned to another, they become the servants of the latter for the time being.²⁶ If the servants of a master are sent to do work upon the property or premises of another, they will become the servants of the latter if they work under his directions and control.²⁷ If A. leases or lends his servant

²⁴ *MCCORD v. WESTERN UNION TEL. CO.*, *supra*. "The acts of S. as agent of the defendant and of the express company were the execution of the different parts of one entire plan or scheme. That his subsequent acts aided and concurred in producing the result aimed at, did not make the forged despatch any the less operative as the procuring or proximate cause of plaintiff's loss." (Per Vanderbilt, J.)

²⁵ See, generally, Huff. Agcy., 2d ed., chap. 18.

²⁶ *COTTON v. LINDGREN* (1895), 106 Cal. 602; 39 Pac. 939; 46 Amer. St. Rep. 255; *BROWN v. SMITH* (1890), 86 Ga. 274; 12 S. E. 411; 14 Am. Neg. Cas. 80, n.; 22 Amer. St. Rep. 456; *KIMBALL v. CUSHMAN* (1869), 102 Mass. 194; 4 Amer. Rep. 528; *HASTY v. SEARS* (1892), 157 Mass. 123; 31 N. E. 759; 34 Amer. St. Rep. 267; *Driscoll v. Towle* (1902), 181

Mass. 416; 63 N. E. 922; *Delaware, etc., Railroad Co. v. Hardy* (1896), 59 N. J. Law, 35; 34 Atl. 986; 16 Am. Neg. Cas. 658, n.; *HIGGINS v. WESTERN UNION TEL. CO.* (1898), 156 N. Y. 75; 50 N. E. 500; 66 Amer. St. Rep. 537; *Burd. Cas. Torts*, 413, note; *POWELL v. CONSTRUCTION CO.* (1890), 88 Tenn. 692; 13 S. W. 691; 17 Amer. St. Rep. 925.

²⁷ *Green v. Sansom* (1899), 41 Fla. 94; 25 So. 332; *Wood v. Cobb* (1866), 13 Allen (Mass.), 58; *Ward v. New England, etc., Co.* (1891), 154 Mass. 419; 28 N. E. 219; *HASTEY v. SEARS* (1892), 157 Mass. 123; 31 N. E. 759; 34 Amer. St. Rep. 267; *DELORY v. BLODGETT* (1904), 185 Mass. 126; 69 N. E. 1078; 64 L. R. A. 114; *Roe v. Winston* (1902), 86 Minn. 77; 90 N. W. 122; *McInerny v. Delaware, etc., Co.* (1897), 151 N. Y. 411; 45 N. E. 348; *Wiest v. Coal Creek Railroad* (1906), 42 Wash.

Sec. 6. Servant of Two Masters.

"It often happens that there is a sort of duality of service."²⁰ "Doubtless, no man can serve two masters, yet the law recognizes a sort of duality of service. A general servant of one person may, for a particular work, become *pro hac vice*, the servant of another person."²¹ Of course, the same person may be acting in a particular transaction as the servant of two masters, as when the affairs of two corporations are carried on at the same place and by the same employees. If it is found as a matter of fact that the tort was committed by one while rendering service to both corporations, both will be liable.²² Thus, plaintiff was injured at a railroad crossing by reason of the negligence of the flagman stationed there. There were two sets of tracks at the crossing, one belonging to defendant and one to another company, which latter employed and paid the flagman. He had been employed at this crossing ten years, during which time he had flagged defendant's train. The court held the facts justified a finding that the flagman was a servant of the defendant company.²³ In another case one S. for a long time previous to a given date had acted as agent for both an express company and defendant telegraph company, and was well informed of plaintiff's method of doing business with his correspondent D. S. sent D. a forged telegram, purporting to be from

²⁰ Burd. Torts, p. 137, citing and quoting from Delaware, etc., Railroad Co. v. Hardy (1896), 59 N. J. Law 35, 37; 16 Am. Neg. Cas. 658, n., 34 Atl. 986; Atwood v. Chicago, etc., Railroad Co. (1896), 72 Fed. 447, 454.

²¹ Delaware, etc., Railroad Co. v. Hardy, *supra*.

²² Diethers v. St. Paul, etc., Co. (1902), 86 Minn. 474; 91 N. W.

15. Cf. McCORD v. WESTERN UNION TEL. Co. (1888), 39 Minn. 181; 39 N. W. 315; 1 L. R. A. 143; 12 Amer. St. Rep. 636; Huff. Cas. Agcy. 306.

²³ Denver, etc., Railroad Co. v. Gustafson (1895), 21 Colo. 393; 41 Pac. 505. Cf. Brow v. Boston, etc., Railroad Co. (1892), 157 Mass. 399; 32 N. E. 362.

the driver is the servant of the owner.³¹ In all such cases the test is, whether, in the particular service which the servant is engaged to perform, he continues liable to the direction and control of his general master or becomes subject to that of the party to whom he is lent or hired.³²

³¹ SACKER v. WADDELL (1903), 98 Md. 43; 56 Atl. 399; 103 Amer. St. Rep. 374; Fenner v. Crips Brothers (1899), 109 Iowa, 155; 80 N. W. 526; HUFF v. FORD, *supra*; JOSLIN v. GRAND RAPIDS ICE Co. (1883), 50 Mich. 516; 45 Amer. Rep. 54; McColligan v. Pennsylvania Railroad Co. (1906), 214 Pa. St. 229; 53 Atl. 792; 6 L. R. A. (N. S.), 544; 112 Am. St. 739.

³² Coughlin v. Cambridge (1896), 166 Mass. 268; 44 N. E. 218; DELORY v. BLODGETT, *supra*; Consolidated, etc., Co. v. Kiehl, *supra*; Grace, etc., Co. v. Probst (1904), 208 Ills. 147, 76 N. E. 12. Cf. SACKER v. WADDELL, *supra*. "It often happens that a man is hired and paid by A., and thus becomes his servant, but for certain transactions is transferred by A. to the service of B. While thus engaged about B.'s affairs, he tortiously injures a third person. Is A. or B. to respond as master for the damage? Upon principle, the answer would seem not to be difficult and that A. or B. should be liable, according as the one or the other had the right to control the act or omission which caused the harm. And such seems to be the answer given by the best considered cases." Burdick on Torts, 136. There are numerous in-

stances wherein the existence of a general relation of master and servant between two persons does not exclude the like relation between such servant and a third party, to the extent of a special service wherein he is actually engaged; accordingly servants in the general employ of a contractor or of his employer may be the servants of the other for some special purpose. Johnson v. Boston (1875), 118 Mass. 114; HARDY v. SHEDDEN Co. (1897), 47 U. S. App. 362; 78 Fed. 672; 37 L. R. A. 33, per Taft, J.; The Coleridge (1896), 72 Fed. 676; Killea v. Faxon (1877), 125 Mass. 485; Breslin v. Sparks (1904), 97 App. Div. 69; 89 N. Y. Supp. 627; Cunningham v. Syracuse, etc., Co. (1897), 20 App. Div. 171; 46 N. Y. Supp. 954; Pioneer, etc., Co. v. Clifford (1906), 125 Ills. App. 352, question for jury; Otis, etc., Co. v. Wingle (1907), 82 C. C. A. 62; 152 Fed. 914; ILLINOIS, ETC., Co. v. Cox (1858), 21 Ills. 20; 71 Amer. Dec. 298, *contra*; COGGIN v. CENTRAL RAILROAD (1879), 62 Ga. 685; 35 Amer. Rep. 132; Mills v. Thomas, etc., Co. (1900), 54 App. Div. 124; 66 N. Y. Supp. 398; 172 N. Y. 660; 65 N. E. 1119; Moran v. Carlson (1904), 95 App. Div. 116; 88 N. Y. Supp. 520; McDonough v. Pelham, etc., Co.

to B. pursuant to an arrangement by which B. is to have the right to direct the acts or control the conduct of the servant, B. must respond for the torts of the servant while thus engaged.²⁸ With respect to certain acts of servants in general, A. may retain the right of control while with respect to others, the right of control may be vested in B. In such case A. or B. will be liable according as the negligent act belongs to the one or the other class. For example, if A. lets his horses, wagon and driver to a city, which is engaged in paving a street, and through the negligence of the driver, in looking after the shoeing of the horses and driving them, a horse kicks a loose shoe through the plaintiff's plate glass window, A. and not the city is liable.²⁹ But if A. lets his horses, etc., to a city, which is engaged in paving a street, or the like, and the plaintiff is injured by the negligent manner in which the servant carried out an order which the city had a right to give him the city would be liable.³⁰ When one furnishes a carriage and driver for the use of another, the presumption is that

176; 84 Pac. 725; Atlantic, etc., Co. v. Coneys (1897), 82 Fed. 177; 28 C. C. A. 388; Burd. Cas. Torts, 403, note; BRADY v. CHICAGO, ETC., RAILROAD (1902), 114 Fed. 100; 52 C. C. A. 48; 57 L. R. A. 712. Otherwise not: WYLIE v. PALMER (1893), 137 N. Y. 248; 33 N. E. 381; 19 L. R. A. 285; Connelly v. Faith (1899), 190 Pa. St. 553; 42 Atl. 1024; Burton v. Galveston, etc., Railroad (1884), 61 Tex. 526; 21 Am. & Eng. Ry. Cas. 218.

²⁸ DONOVAN v. LONG (1893), 1 Q. B. 629; 63 L. J. Q. B. 25; Burd. Cas. on Torts, 409; DELORY v. BLODGETT, *supra*; Roe v. Winston, *supra*; McInerney v. Dela-

ware, etc., Railroad, *supra*; HIGGINS v. WESTERN UNION TEL. Co., *supra*; Rourke v. White Mountain, etc., Co. (1877), 2 C. P. D. 205; 46 L. J. C. P. 283; Grace v. Hyde, etc., Co. (1904), 208 Ills. 147; 70 N. E. 12.

²⁹ HUFF v. FORD (1878), 126 Mass. 24; 30 Amer. Rep. 645; DELORY v. BLODGETT, *supra*; Consolidated, etc., Co. v. Kiehl (1901), 190 Ills. 145; 60 N. E. 87; 16 Am. Neg. Rep. 613, n.

³⁰ DONOVAN v. LONG, *supra*; Driscoll v. Towle (1902), 181 Mass. 416; 63 N. E. 922; Roe v. Winston (1902), 86 Minn. 77, 86; 90 N. W. 122.

hires convict labor is liable as master to a convict "in respect to those incidents of the employment over which he has the same measure of control that a master ordinarily has, but not as to those features of the employment over which he is essentially deprived of such control."³⁶ Under such circumstances the mere presence of the government employee, who has charge of the convicts, does not relieve the hirer of the convicts from his liability for the tortious conduct of his own agent.³⁷

Sec. 9. Volunteers as Servants.

One who voluntarily assists a servant at the latter's request does not, as a general rule, become a servant of the master, so as to impose upon the latter the duties and liabilities of a master towards such volunteer, or so as to render the master liable to third persons injured by such volunteer's acts or negligence, while rendering such assistance.³⁸ A volunteer is one who, without the request or consent of

lecting one out of six thousand bargemen. *Martin v. Temperly* (1843), 4 Q. B. 298. Cf. *Story Agcy.*, 9th ed., 456a.

³⁶ *BALTIMORE, ETC., CO. v. JAMAR* (1901), 93 Md. 404; 49 Atl. 847; 86 Amer. St. Rep. 428; *Hartwig v. Bay State, etc., Co.* (1887), 43 Hun (N. Y.), 425.

³⁷ *Chattahoochee, etc., Co. v. Braswell* (1893), 92 Ga. 631; 18 S. E. 1015; see, generally, *Huff. Agcy.*, 2d ed., Chap. 19.

³⁸ *Georgia, etc., Railroad v. Propst* (1888), 85 Ga. 203; 4 So. 711; *ATLANTA, ETC., RAILROAD v. WEST* (1905), 121 Ga. 641; 49 S. E. 711; 104 Amer. St. Rep. 179; 67 L. R. A. 701; *CHURCH v. CHICAGO, ETC., RAILROAD* (1892),

50 Minn. 218; 52 N. W. 647; 16 L. R. A. 361; *EVARTS v. ST. PAUL, ETC., RAILROAD* (1894), 56 Minn. 141; 57 N. W. 459; 45 Amer. St. Rep. 460; 22 L. R. A. 663; *Longa v. Stanley, etc., Co.* (1903), 69 N. J. Law, 31; 54 Atl. 251; *WISSEHAM v. RICKARD* (1890), 136 Pa. St. 109; 20 Atl. 532; 20 Amer. St. Rep. 900; 10 L. R. A. 97; *Langan v. Tyler* (1902), 114 Fed. 716; 51 C. C. A. 503; *CINCINNATI, ETC., RAILROAD v. FINNELL* (1900), 108 Ky. 135; 55 S. W. 902; 57 L. R. A. 266. (Such a volunteer assumes all the risks of the service upon which he enters and is only entitled to the protection due a trespasser.)

Sec. 8. Compulsory Service.

"If one is compelled by law to accept another's services, he ought not to be answerable for injuries caused by the latter. So, if one is compelled by law to serve another, he should not be considered a fellow-servant of other employees so as to preclude recovery for their negligence. Whether such former employment is compulsory may depend upon the range or power of selecting employees." ³³ "Those who, under a public license, exercise a certain employment on behalf of any member of the public who may hire them (such as licensed public carmen, drovers, pilots, draymen) do not stand in the relation of servant to any one who may hire them to do a particular job, such as they are licensed to do, but are deemed independent contractors; but this rule has its limitations, for the fact that a man is obliged by law to select servants to carry on a particular employment from a particular class of men skilled in such employment and licensed to follow it, does not exclude the possibility of relation of master and servant existing between them." ³⁴ A pilot, whom the master of a vessel is compelled by law to accept, is not his servant. ³⁵ One who

(1906), 111 App. Div. 585; 98 N. Y. Supp. 90; *Gerlach v. Edelmeyer* (1881), 15 Jones & S. 392; 88 N. Y. 645. As to winch men and stevedores' servants, see *The Harold* (1884), 21 Fed. 428; *The Joseph John* (1898), 86 Fed. 471; 30 C. C. A. 199; *The Anaces* (1898), 87 Fed. 565; *The Elton* (1906), 142 Fed. 367; 73 C. C. A. 467; *The Victoria* (1895), 69 Fed. 160; *The Lisnacrieve* (1898), 135 Fed. 879, (1906) 143 Fed. 955; *Standard Oil Co. v. Anderson* (1907), 152 Fed. 166; 81 C. C. A. 399; *The Slingsley* (1902), 120

Fed. 748; *The Gladestry* (1904), 128 Fed. 591. Cf. *SANFORD V. STANDARD OIL CO.* (1890), 118 N. Y. 576; 24 N. E. 313; 16 Amer. St. Rep. 787; *Lauro v. Standard Oil Co.* (1902), 74 App. Div. 4; 76 N. Y. Supp. 800; *Johnson v. Netherlands, etc., Co.* (1892), 132 N. Y. 576; 30 N. E. 505.

³³ See, generally, *Huff. Agcy.*, 2d ed., Sec. 235.

³⁴ *Thompson Negligence*, Sec. 638.

³⁵ *Steam Navigation Co. v. British, etc., Navigation Co.* (1868), L. R. 3 Exch. 330. *Contra*, se-

morals and in law one is responsible for the things which he brings to pass, whether he employs an inanimate object to effectuate his purpose or sets in operation the infinitely more complicated chain of causation which results from the employment of another moral agent.⁴³ "*Michael v. Alestree* (1677, 2 Lev. 172, 3 Keb. 650), is generally looked upon as marking the beginning of the modern conception of the liability of masters for their servants' torts." A servant undertaking to train horses in a public place injured a bystander, and the master, though absent, was held liable, on the theory of presumptive command. The master and servant were joined as defendants, and both were held liable. "Thereafter the idea that only the master and not the servant is liable for damages occasioned by the latter's negligence found no recognition."⁴⁴ "It has been contended that we must seek the basis of liability in cases where the representative's acts are neither commanded nor ratified, and are in excess of any actual authority conferred, (1) in the fiction of identity, (2) in the voluntary act of the employer in setting the representative in motion, or that one must answer, within reasonable limits, for an instrumentality operating for his benefit, or (3) mainly by the practical consideration that the employer is usually better able to pay than the representative."⁴⁵

Sec. 11. Basis of Principal's Liability.

"The responsibility of the principal to third persons is not confined to cases where the contract has been actually made under his express or implied authority. It extends further and binds the principal in all cases where the agent is acting within the scope of his usual employment or has been held out to the public or to the other party as having

⁴³ 2 Street Legal Liab., 429.

⁴⁴ Id., 451.

⁴⁵ Huff. Agcy., 2d ed., Sec. 5, abridged.

the master of his authorized representative, undertakes to perform a service for the master, either as a mere interloper or in order to advance some interest of the volunteer or of the master.³⁹ But if the servant has authority, express or implied, to employ assistants, a volunteer assisting is a sub-servant, both in his relation to the master and in the latter's relation to third persons.⁴⁰ When a passenger is injured by the negligence of a volunteer called in by a servant, even though without the knowledge or authority of the master, the master has been held liable.⁴¹ "There is an increasing class of cases in which the exercise of proportionate care is held to be due to servants of different masters who assist in the performance of a service mutually beneficial to such employers," and such assisting servants are not as a matter of law to be treated as mere volunteers.⁴²

Sec. 10. Basis of Constituents' Liability.

Representation is only an extension of the fundamental conception of responsibility for one's own acts. Both in

³⁹ See Sec. 240, Huff. Agcy., 2d ed.

⁴⁰ *HALUPTZOK v. GREAT NORTHERN RAILROAD* (1893), 55 Minn. 446; 57 N. W. 144; 26 L. R. A. 739; and compare *JOHNSON v. ASHLAND, ETC., Co.* (1888), 71 Wis. 553; 37 N. W. 823; 5 Amer. St. Rep. 243.

⁴¹ *Lakin v. Oregon, etc., Railroad* (1887), 15 Ore. 220; 15 Pac. 355. To the same effect, *Althorf v. Wolfe* (1860), 22 N. Y. 355; master held liable for injuries caused by servant's volunteer assistant negligently throwing ice from defendant's roof, the master being bound to see that his prem-

ises were so used as not to injure others.

⁴² *KELLY v. TYRA* (1908), 103 Minn. 176; 114 N. W. 750; 17 L. R. A. (N. S.), 343, per Jaggard, J., citing *inter alia*, *Wright v. London, etc., R.* (1866), L. R., 1 Q. B. 252; *Hannigan v. Union, etc., Co.* (1896), 3 App. Div. 618; 38 N. Y. Supp. 272; *Connors v. Great Northern, etc., Co.* (1904), 90 App. Div. 311; 85 N. Y. Supp. 644; *Meyer v. Kenyon, etc., Co.* (1905), 95 Minn. 329; 104 N. W. 132; *WELCH v. MAINE, ETC., R.* (1894), 86 Md. 552; 30 Atl. 116; 25 L. R. A. 661.

person of known incompetency; or, in case of a special hazard, if he employs one of doubtful skill. But as is well known, no amount of care in choosing a servant will relieve the master. . . . In dealing with (this subject) Pollock and Maitland suggest that the desire of reaching a person financially responsible has perhaps unconsciously caused the courts to hold the master liable for the servant's torts done in the course of employment. . . . Still another theory was advanced a number of years ago by Judge O. W. Holmes. He endeavored to show that the master's liability for the negligent tort of his servant results from the application of the ancient fiction of identity of persons as between master and servant. . . . None of these several theories are adequate fully to explain the principle.

. . . Writers on legal theory have been trying to explain a principle which the law accepts as axiomatic. Axiomatic truth in law as elsewhere must be accepted as fundamental and unexplainable. The axiom with which we have to deal is embodied in the statement reiterated by our courts time and again, that the act of the servant is the act of the master. This is a true legal axiom, because the common law proceeds upon it and treats it as a fundamental principle. *Qui facit per alium, facit per se.* . . . If we say that where the master sets in motion a chain of causes, using for that purpose the hands and mind of another free agent, he is responsible for all the acts done by his representative in the conduct of the principal's business, we are merely stating the axiom in another form. All attempts to get nearer to the ultimate legal truth or to resolve the axiom into simpler elements will prove futile."⁴⁹

"During the nineteenth century the wording of the test by which the master's liability is to be determined underwent a change. The expression 'command and consent,

⁴⁹2 Street Legal Liab., p. 458, *et seq.*

competent authority, although, in fact, he has in the particular instance exceeded or violated his instructions and acted without authority. For in all such cases, where one of two innocent persons is to suffer, he ought to suffer who misled the other into the contract by holding out the agent as competent to act and as enjoying his confidence.”⁴⁶ “As to the liability of principals to third persons for the acts of their agents. This topic may be dismissed in a few words; for the whole doctrine turns upon the obvious maxim, that he, who acts by another, acts by himself. . . . In the next place, as to the liability of the principal to third persons for the misfeasances, negligences and torts of his agent. . . . In all such cases the rule applies, *respondeat superior*; and it is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealings either directly with the principal or indirectly with him through the instrumentality of agents.”⁴⁷ “Most, if not all, the liabilities of the principal for the acts of his agent grow out of the fiction of unity or identity; the contract in contemplation of law, is entered into by the principal himself, for he and the agent are identical.”⁴⁸

Sec. 12. Basis of Master's Liability.

“Many reasons have been assigned by different writers for holding a master liable for damage resulting from his servant's negligent act. Nearly all of them have been criticised and declared inadequate. . . . The most hoary reason is that long ago advanced by civilians, namely, that the master is liable because, as the event shows, he has employed an incompetent servant. Now it may well be conceded that the master should be liable if he employs a

⁴⁶ Story Agcy., 9th ed., Sec. 443.

⁴⁸ Reinhard Agcy., Sec. 321.

⁴⁷ Id., Secs. 451, 452.

Sec. 13. Distinction between Servants and Independent Contractors.

We have already noted the distinction between a servant and an agent. We have now to inquire whether one who is performing operative or ministerial acts for another is in the conventional relation of a servant to the master or whether he is an independent contractor. There is a wide difference between a servant and an independent contractor. It may be stated generally that if a person contracts with another who is engaged in an independent employment, for the doing of certain work by the latter, but does not personally interfere or give directions respecting the manner of the work, the relationship of master and servant does not exist, but the party employed is an independent contractor. "When a person desires a particular act done he may either hire a workman to do it, retaining control of the servant and directing his work, or he may let the job by contract simply stipulating that it shall be done in accordance with certain specifications, but retaining no control over the contractor or his methods of work. In the first case the workman is a servant; in the second he is an independent contractor."⁵² Bramwell, L. J., remarked in a letter to Sir H. Jackson regarding the English Employers' Liability Act of 1880: "The relation of master and servant exists where the master can not only order the work, but how it shall be done. When the person to do the work may do it as he pleases, then such person is not a servant."

A recent Minnesota case recites: "The terms 'independent contractor' and 'servant,' as applied to the subject in hand, are somewhat unsatisfactory, but are used for want of better ones. The word 'servant' as used in this connection is applicable to any relation in which, with reference to the matter out of which the alleged wrong has sprung,

⁵² Huff. Agcy., 2d ed., Sec. 218.

express or implied,' was completely supplanted by the 'scope or course of employment.' This change in the phraseology of the test marked the ripening of the previous presumption of fact into the positive rule of law. The master now becomes absolutely liable for all acts done in the course of employment even though there be contrary private instructions and the act itself be plainly against the master's interest."⁵⁰ As a general proposition, it may be said that the liability of the master for torts committed by his servant is based on the theory of selection and control, either actual or implied; that he may choose who shall do his work, direct how it shall be accomplished, and retain or discharge the workmen at his option; and if these essential principles of representation are lacking the doctrine of *respondeat superior* does not apply. If I send my horse to the smith to be shod, although he and his helpers do my work, it is evident that they are not my "servants" within the accepted legal sense of the word, and that I am not responsible for any injury that may come to others through their negligent manner of doing my work; and if I engaged a carpenter to make and deliver to me a box of certain dimensions, it is still quite clear that I can not be compelled to respond in damages for his carelessness in executing my order. In each of these cases the contract is for a specific thing. If the horse is returned properly shod, or the box finished according to specifications, it is immaterial where, how, or by whom the actual work is done. These are intermediate considerations over which the employer exercises neither volition nor control. In such conditions the person so undertaking to achieve a certain result, free from dictation or interference, is called, for purposes of convenience, an independent contractor.⁵¹

⁵⁰ Id., 456.

⁵¹ Barrows' Neg., p. 160, citing many cases.

and servant and cases of employer and independent contractor seems to be this, that when the person actually doing the work does something for which he would himself be liable, the master is, whilst the employer is not, liable for what is conveniently called 'collateral negligence,' meaning thereby negligence other than the imperfect or improper performance of the work which the contractor is employed to do."⁵⁴ "In all ordinary transactions the existence of the relation of contractor as between two given persons excludes that of principal and agent, and master and servant. But there is not necessarily such a repugnance between them that they can not exist together. . . . Hence, the fact that an employee was a servant as respects one part of the functions discharged by him will not involve the consequences that the employer must answer for injuries caused by an act of negligence, while he was engaged in

the railroad station, though hired and paid for the service by the owner of the baggage or the goods, is not the servant of the person who thus employs him. He is exercising an independent and quasi-public employment in the nature of a common carrier and his customers, whether few or many, are not generally responsible for his negligent or wrongful acts, as they may be for those of other persons in their regular employment as servants. A contract, whether express or implied, under which such special jobs are done or such special services rendered, is not that of master and servant within the law of negligence." Prevailing opinion in *MURRAY v. DWIGHT* (1900), 161 N. Y. 301; 55 N. E. 901; 48 L. R. A. 673.

⁵⁴ *Hardaker v. Idle District Council, etc.* (1891), 1 Q. B. 352, per Lord Justice Rigby. "Liability for the collateral negligence depends entirely upon the existence of the relation of master and servant between the employer and the person actually in default." *Blackburn, J., in Mersey, etc., Co. v. Gibbs* (1864), L. R., 1 H. L. 93. So, also, generally, if A. places his servants on B.'s premises pursuant to an arrangement by which B. is to have the right to direct the acts or control the conduct of the servant, B. must respond for the torts of the servant while thus engaged. *BRADY v. CHICAGO, ETC., RAILROAD* (1902), 114 Fed. 100; 52 C. C. A. 48; 57 L. R. A. 712; *Atwood v. Chicago, etc., Railroad* (1896), 72 Fed. 447. Ante, Sec. 7.

the person sought to be charged had the right under the contract of employment to control, in the given particular complained of, the action of the person doing the alleged wrong. In every case the decisive question in determining whether the doctrine of *respondeat superior* applies is, had the defendant the right to control in the given particular the conduct of the person doing the wrong. If he had, he is liable. On this question the contract under which the work was done must speak conclusively—in every case reference being had, of course, to surrounding circumstances. If defendant had such control, the mere fact that the agent who did the injury carried on a separate and independent employment will not absolve his principal from liability. If this control existed, it makes no difference whether the person doing the injury was the ‘servant’ of the defendant in the popular sense of that word, or a person merely employed to do a specified job or piece of work.”⁵³ “The true distinction between cases of master

⁵³ *Rait v. New England, etc., Co.* (1896), 66 Minn. 76; 68 N. W. 729. An early leading Massachusetts case decides that “if the person employed to do the work carries on an independent employment, and acts in pursuance of a contract with his employer, by which he has agreed to do the work on certain specified terms in a particular manner and for a stipulated price, then the employer is not liable. The relation of master and servant does not subsist between the parties, but only that of contractor and contractee.” *Bigelow, C. J., in BRACKETT v. LUBKE* (1862), 4 Allen, 138; 81 Amer. Dec. 694. In another leading case it is said:

“The relation of master and servant is often confused with some other relation. The mere fact that some person renders some service to another for compensation, expressed or implied, does not necessarily create the legal relation of master and servant. There are many kinds of employment which are peculiar and special, where one person may render service to another without becoming his servant in the legal sense. A servant is one who is employed to render personal services to his employer otherwise than in the pursuit of an independent calling. The truckman who transports the traveler’s baggage or the merchant’s goods to

of an independent contractor was held in an early English case to constitute "an exception to the generality of the rule *qui facit per alium facit per se*, made necessary by public convenience and general usage, and when the reason of the rule does not so fully apply."⁵⁷ "Assuming that the right of control be unimpeachable, it is clear that the exercise or non-exercise of that right by the employer is not an available element for the purposes of differentiating where it is a question of distinguishing between agents and independent contractors."⁵⁸ The allegation that "G. and

⁵⁷ *Wiswall v. Brinson* (1849), 32 N. C. (10 Ired. L.) 554. Compare *Quarman v. Burnett* (1840), 6 Mees. & W. 509; 4 Am. Neg. Rep. 437, n.

⁵⁸ Note to *RICHMOND v. SITTING* (1903, Va.), in 65 L. R. A., at p. 443, by Mr. C. B. Labatt, in which the learned writer says further: "In the absence of any judicial discussion bearing directly upon the problem thus indicated (*i. e.*, the difference between agents and independent contractors), it is with much diffidence that the writer ventures to suggest that these two classes of employees can be discriminated, if at all, only by considering their position with reference to the character of the work which is ordinarily intrusted to them. An agent is ordinarily appointed to represent his principal in some transaction or transactions arising out of business, trade or commerce.—Not infrequently the discharge of such functions by an agent may also involve the performance of a considerable amount of manual labor by him-

self or others, in dealing with various material substances; but such operations are merely an incidental result of the execution of his agreement. Such situations may, and often do, occur in connection with the transactions of auctioneers and factors.—On the other hand, it is clear that operations of this character have formed the subject of the undertaking in the great majority of the cases in which the rights and liabilities arising out of the employment of independent contractors have been discussed. If, therefore, the terms 'agent' and 'independent contractor' are to be considered as having relation to two entirely separate regions of fact, this circumstance may possibly be taken as the distinctive factor which in any given case will determine the class to which the employee should be assigned.—So far as civil actions are concerned, there would seem to be no logical objection to taking, as the element which fixes the character of the employment, that aspect of an independent con-

work which he had undertaken as an independent contractor." ⁵⁵

Sec. 14. Distinction between Agents and Independent Contractors.

It has been said that "the difference between an agent and an independent contractor is, that the agent undertakes to act in the matter of the agency, subject to the directions and control of his employer, whereas an independent contractor does not, but contracts to perform certain specified work or produce a certain specified result, the manner and means of performance or production being left to his discretion, except so far as they are specified by the contract." ⁵⁶ The non-liability of an employer for the torts

⁵⁵ Note to *RICHMOND v. SITTERDING* (1903, Va.), 65 L. R. A. 449, citing *DETROIT v. CORY* (1861), 9 Mich. 165; 80 Amer. Dec. 78. One employed to do editorial work, agreeing to devote his whole time during his employer's regular office hours to work for compensation based on the number of pages of his contribution accepted by the employer, who furnished him all materials and all the assistance for performing his work, and who was to be the sole owner of the copyrights thereon, although not a servant, in the ordinary sense of the term, was not an independent contractor. *Edw. Thompson Co. v. Clark* (1904), 109 N. Y. Supp. 700. In *Berg v. Bousfield* (1896), 65 Minn. 355, 16 Amer. Neg. Cas. 188, the rule was applied that where one who performs work for another represents the will of such other not only as to the re-

sult but also as to the means by which it is accomplished, he is not an independent contractor but the agent of that other who is responsible for his acts and omissions within the scope of his authority. Defendant railroad company shipped coal in cars to its agent G., who in turn contracted with S. to unload the cars at so much per car, S. not being controlled in unloading. In unloading a car, S. threw a heavy plank from the top of the car and struck plaintiff, passing by. Held: That S. was a servant acting within the course of his employment and not an independent contractor. *Holmes v. Tennessee, etc., Co.* (1897), 49 La. Ann. 1465; 22 So. 401; 1 Amer. Neg. Rep. 174, citing *Shea v. Reems* (1884), 36 La. Ann. 969.

⁵⁶ Bowstead, *Law of Agcy.*, 3, note.

between an employer and employee is that of master and servant or not is, as already shown, a matter of considerable importance. The importance is not so much, however, in tracing the distinction between a servant and an agent as it is in ascertaining the distinction between a servant and a contractor. The doctrine of *respondeat superior* renders the master liable for those acts of his servants which have been committed in the course of the service he was employed to render; and the same liability obtains on the part of the principal for the acts of his agent done in the line of such agent's employment. But a contractor, being neither a servant nor an agent, sustains no such relation to his employer as will render the latter liable for his acts, whether they be performed in or out of the scope of the employment. The rule *respondeat superior* has no application to an independent contractor who is employed, for instance, to do a piece of work for the employer, during the performance of which a third person is injured.⁶¹ The maxim of *respondeat superior* "is only applicable in cases where the party sought to be charged stands in the relation of superior to the person whose wrongful act is the ground of complaint."⁶²

⁶¹ Reinhard Agcy., Sec. 474, citing Robinson v. Webb (1875), 11 Bush (Ky.), 464; BAILEY v. TROY, ETC., RAILROAD (1883), 57 Vt. 252; 52 Amer. Rep. 129. Under either theory (*i. e.*, of liability or exemption), the intermediate agents of a municipal corporation who make the contract or direct the work to be done, will not become liable for any negligence or other wrong by the contractor or his employees in executing it on the ground of *respondeat superior*, the work not

being wrongful *per se*. In such case, if there is any liability on the part of a superior of the immediate actor, it is the liability of the municipal corporation. McKenna v. Kimball (1888), 145 Mass. 555; 14 N. E. 789.

⁶² Blackwell v. Wiswall (1855), 24 Barb. (N. Y.), 355. Cf. BIBB v. NORFOLK, ETC., RAILROAD (1891), 87 Va. 711; 14 S. E. 163; 47 Am. & Eng. Rail. Cas. 651; Cincinnati v. Stone (1855), 5 Ohio St. 38; DuPratt v. Lick (1869), 38 Cal. 691; HILSDORF v. ST. LOUIS

McK. were employees of, or contractors for, the defendant" did not necessarily mean that they were independent contractors. If they were contractors for the defendant, their work may have been such as to constitute them agents of the defendant.⁵⁹

Sec. 15. Doctrine of *Respondeat Superior*.

The liability of the constituent for the misfeasances, negligences and torts of his agents and servants, discussed in a previous section, extends not only to the injuries and wrongs of the representative who is immediately employed by the constituent in a particular business, but also to the injuries and wrongs by others who are employed by that representative under him, or with whom he contracts for the performance of the business; for the liability reaches through all the stages of the service so long as the relation of master and servant continues.⁶⁰ Whether the relation

tractor's position which exhibits him as a substitute or deputy of the contractee (employer) in respect to the performance of the stipulated work.—In this point of view an independent contractor will be simply an agent whose employment does not carry with it certain incidents by which it is ordinarily attended, and he may be conceived as being distinguished from other kinds of agents by the diagnostic mark which is referred to in the last paragraph.—It is impossible, however, to affirm that the very vague criterion thus suggested for purposes of differentiating is one of universal applicability, or that it is habitually recognized or taken into account by the courts. Indeed, cases are not wanting in

which employers have been held liable on the specific ground that the tort-feasor was a servant, and not an independent contractor, although, so far as can be seen, the facts involved were such that this conclusion might equally well have been reached through the application of the principles of the law of agency."

⁵⁹ *BESSEMER, ETC., Co. v. DOAK* (1907), 151 Ala. 670; 44 So. 627; 12 L. R. A. (N. S.), 389, 391.

⁶⁰ *Story Agcy.*, 9th ed., Sec. 454, citing *Reeves v. State Bank*, 8 Ohio St. 476; *BUSH v. STEINMAN* (1799), 1 Bos. & P. 409, with exhaustive note; *Nicholson v. Mounsey*, 15 East, 384; *Weyland v. Elkins*, Holt's N. P. 227; 1 Starkie, 272.

MAN, to which reference will, from time to time, be made, was soon discredited and the law is now well settled that the man who has immediate control or the right of control over the work is the master, and will be governed by the rule of *respondeat superior*.⁶⁴

Sec. 16. Independent Contractor Defined.

"When the person employed is in the exercise of a distinct and independent employment and not under the immediate supervision and control of the employer, the relation of master and servant does not exist and the liability of a master for his servant does not exist."⁶⁵ An independent contractor, within the meaning used in this work, has been defined as "one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished."⁶⁶ "We recognize the rule that where one person contracts with another to do and perform certain work or labor, and the person for whom the work is done has no control or management thereof, the one who undertakes the work becomes an independent contractor."⁶⁷ An independent contractor has also been defined to be "one who, exercising an independent employment, contracts to

⁶⁴ Cf. 2 Street Legal Liab., 472, citing *Reedie v. London, etc., Railroad* (1849), 4 Exch. 255; 6 Eng. Rail. & Corp. Cas. 184; 4 Am. Neg. Rep. 438, n; 9 Id., 122, n; *Hilliard v. Richardson* (1855), 3 Gray (Mass.), 349; 63 Amer. Dec. 743; *Pendleton v. Greenlagh* (1875), 1 Q. B. Div. 36.

⁶⁵ *Linton v. Smith* (1857), 8 Gray (Mass.), 147. See, generally, *ante*, Sec. 13, *et seq.*

⁶⁶ *HARRISON v. COLLINS* (1878),

86 Pa. St. 153; 27 Amer. Rep. 699, quoted and adopted in *Thompson on Negligence*, Sec. 622, and *Tiffany on Dom. Rels.*, p. 508. "An independent contractor is one who, exercising his own volition and judgment as to means and methods, undertakes to achieve a definite result." *Barrows on Neg.*, Sec. 59, black letter text.

⁶⁷ *Wiley, P. J.*, in *Falender v. Blackwell* (1906), 39 Ind. App. 121, 126; 79 N. E. 393.

On the other hand it is obvious that the control stipulated for in the contract may be so absolute as to make the discretion of the contractor wholly subordinate to that of the employer, or to that of his engineer, architect, or other superintendent; in which case the relation of master and servant is deemed to arise and the maxim of *respondeat superior* applies.⁶³ The early case of *BUSH v. STEIN-*

(1869), 45 Mo. 94; 100 Amer. Dec. 352; *Deford v. State* (1868), 30 Md. 179. "The modern decisions have placed two limitations upon the liability of the master which deserve notice. The fellow-servant doctrine relieves the master from liability where the person injured is a fellow-servant of the tort-feasor. Some difficulty has been encountered in finding the proper basis for the rule.—The other limitation on the master's liability is found in those cases where an independent contractor is employed. Here the person who lets the contract is not liable for the torts of the servants employed by the contractor. The reason is obvious. The conductor, or one who lets the contract, has no control over employees of the contractor, and hence is not treated as their master. He is only concerned with the finished product of their labor, and the contractor, both in fact and in theory, is the master of those whom he employs. Simple as this appears, the principle in question was violated in probably the first case presenting facts of this kind." 2 *Street Legal Liab.*, 470, citing *BUSH v. STEINMAN* (1799), 1 B. & P. 404. "It

is a doctrine as old as the Bible itself, and the common law of the land follows it, that a man cannot serve two masters at the same time; he will obey the one and betray the other. He cannot be subject to two controlling forces which may at any time be divergent. So the English courts, which are generally apt to hit the blot in the application of fundamental rules, hold that there can be no application of the doctrine of *respondeat superior* in its application to two distinct masters; that the servant must be subject to the jurisdiction of one master at one time." *Philips, J.*, in *Atwood v. Chicago, etc., Railroad* (1896), 72 Fed. 447, 454.

⁶³ *Newton v. Ellis* (1885), 5 El. & Bl. 115; *Blake v. Thirst* (1863), 2 Hurl. & C. 20. Cf. *Burgess v. Gray* (1845), 1 C. B. 578; *Pearson v. Cox* (1877), 2 C. P. Div. 369. "It follows, therefore, that the mere fact that a person exercises generally an independent employment, in which he is skilled, does not exclude the conclusion that he may be the servant of one who hires him to do a particular job." *Thomps. Neg.*, Sec. 638.

one contracts to do and deliver certain specific work which is not unlawful, and the manner of the doing of which, including the employment, payment and control of the labor is left entirely to him, he is an independent contractor for whose acts and omissions, in the execution of such contract, the other contracting party is not liable, since the doctrine of *respondeat superior* has no application where the employee represents the employer only as to the lawful purpose of the contract, but does not represent him in the means by which that purpose is to be accomplished.⁷⁰ Independent

ness, and in the line of this business is employed to perform a piece of work, and in doing it determines for himself in what manner the work shall be done, and represents the will of his employer only as to the result of the work. *Zimmerman v. Bauer* (1894), 11 Ind. App. 607; 39 N. E. 299; *Keys v. Second Baptist Church* (1904), 99 Me. 308; 59 Atl. 446; 17 Am. Neg. Rep. 526. Cf. *Bjornsen v. Sacone* (1899), 88 Ills. App. 6; *Knowlton v. Hoit* (1891), 67 N. H. 155; 30 Atl. 346.

A Missouri case declares: "We find no countenance for the proposition that a person not especially qualified for a particular service, but ready to undertake any job which may be offered to him that he thinks himself able to perform, becomes, when hired for some job, an independent contractor simply because the employer relinquishes control over the work and trusts to the employee's discretion. It looks like the employee must have a calling in which it is fair to presume he has developed skill,

before he will be regarded otherwise than as a servant. We do not say he must have a trade or profession, be a skilled mechanic, doctor or lawyer; but he must hold himself out as having an occupation with which he is familiar." *Mullich v. Brocker* (1905), 119 Mo. App. 332, 97 S. W. 551, in which an employee having no regular vocation agreed to break in a pony, for a stated sum, taking it out in the morning and returning it to the employer's barn in the evening, was held not to be an independent contractor.

⁷⁰ *Robideaux v. Hebert* (1907), 118 La. 1089; 43 So. 887; 12 L. R. A. (N. S.), 632, head note by Monroe, J., citing *Peyton v. Richards* (1856), 11 La. Ann. 63; *Gallagher v. Southwestern, etc., Co.* (1876), 28 La. Ann. 943; *RILEY v. STATE LINE, ETC., Co.* (1877), 29 La. Ann. 791; 29 Am. Rep. 349; *Sweeny v. Murphy* (1880), 32 La. Ann. 628; *Moffatt v. Koch* (1901), 106 La. 371; 31 So. 40; *Casement v. Brown* (1893), 148 U. S. 615; 16 Amer. & Eng. Enc. of Law, 2d ed., 187.

do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of his work.”⁶⁸

In a recent New York case it is said that “where a person is employed to perform work which requires the exercise of skill and judgment, and the execution of it is left entirely to his discretion, with no restriction as to its exercise, and no limitation as to the authority conferred, and the compensation is dependent on the value of the services, such a person does not occupy the relation of a servant under the control of a master but is an independent contractor and the owner is not liable for his acts or the acts of his workmen, who are negligent and cause injury to another.”⁶⁹ When

⁶⁸ Lurton, J., in *POWELL v. CONSTRUCTION Co.* (1890), 88 Tenn. 692; 13 S. W. 691; 17 Amer. St. Rep. 925. This definition is quoted in *Humpton v. Unterkircher* (1896), 97 Iowa, 509; 66 N. W. 776; 14 Am. Neg. Cas. 592, n., and declared to be the best found by the court; and it is also quoted with approval in *Good v. Johnson* (1907), 38 Colo. 440; 88 Pac. 439; 8 L. R. A. (N. S.), 900. “One is an independent contractor who, for what the job is reasonably worth, undertakes to overhaul the awnings on another’s building, the latter expressing no direction, judgment or discretion in the matter.” *McHarge v. Newcomer* (1907), 117 Tenn. 595; 100 S. W. 700; 9 L. R. A. (N. S.), 298, citing *Powell v. Virginia, etc., Construction Co.*, *supra*; *Knoxville, etc., Co. v. Dodson*, 7 Lea (Tenn.), 367; *Bennett v. Truebody* (1885), 66 Cal. 509; 6 Pac. 329; 56 Amer. Rep. 117; 13 Am. Neg. Cas. 517, n.

An independent contractor is one who undertakes to produce a given result, but so that, in the actual execution of the work, he is not under the order or control of the person for whom he does it and may use his own discretion in things not specified. *Gay v. Roanoke, etc., Co.* (1908, N. C.), 62 S. E. 436. An independent contractor is one who in rendering services, exercises an independent employment or occupation and represents his employer only as to the results of the work and not as to the means by which it is to be accomplished. *Texas, etc., R. v. Parsons* (1908, Tex. Civ. App.), 109 S. W. 240. Cf. *Drennon v. Patton, etc., Co.* (1908, Tex. Civ. App.), 109 S. W. 218.

⁶⁹ *Kueckel v. Ryder* (1900), 170 N. Y. 562; 62 N. E. 1096, affirming 66 N. Y. Supp. 522. An independent contractor is one who carries on an independent busi-

Sec. 17. Relation of Sub-contractor.

A sub-contractor with whom a railway construction company contracts for the construction of a part of its road, as determined by the construction company's engineer as to distance, such sub-contractor to be furnished by the construction company with a locomotive, train and crew, is an independent contractor for whose negligence in **running** the train the construction company was held not liable.⁷⁵ In a New York case it was laid down that even if it should be regarded as a legitimate inference from the testimony, that the principal contractor was acting as the employer's agent in negotiating certain sub-contracts, including that which was made with the one whose negligence caused the injury, the mere fact that the principal contractor undertook such functions would not enlarge the employer's liability for the sub-contractor's negligence since it also appeared that in making the sub-contracts, the employer dealt directly with the sub-contractors themselves.⁷⁶

Sec. 18. Tests of Relation of Independent Contractor.

The test generally applied in answering the question, Who are independent contractors? is "independence of control in employing workmen and in selecting the means of doing the work."⁷⁷ "The proper criterion by which to determine whether in a given case the relation of master and servant exists is found in the right of the master to order and control the other in the performance of the work. A

⁷⁵ *POWELL v. VIRGINIA, ETC., CONSTRUCTION Co.* (1890), 88 Tenn. 692; 13 S. W. 691; 17 Amer. St. Rep. 925.

⁷⁶ *Wolf v. American Tract Society* (1898), 25 App. Div. (N. Y.), 98; 49 N. Y. Supp. 236.

⁷⁷ *Burd. Torts*, p. 133, citing *UPPINGTON v. CITY OF NEW YORK* (1901), 165 N. Y. 222; 59 N. E. 91; 6 Am. Neg. Rep. 366; 53 L. R. A. 550; *WRIGHT v. BIG RAPIDS Co.* (1900), 124 Mich. 91; 82 N. W. 829; 50 L. R. A. 495.

contractors are sometimes spoken of as persons who are exercising or carrying on an "independent employment,"⁷¹ or an "independent business,"⁷² or as being "in the exercise of an independent and distinct employment."⁷³ Several early Scotch cases in which the employer was held liable seem to be inconsistent with the general trend of American and English authorities.⁷⁴

⁷¹ *PICKENS v. DIECKER* (1871), 21 Ohio St., 212; 8 Amer. Rep. 55.

⁷² *ALLEN v. HAYWARD* (1845), 7 Q. B. 960; 4 Eng. Rail. & Corp. Cas., 104.

⁷³ *LINTON v. SMITH* (1857), 8 Gray (Mass.), 147. "An analysis of the elements embraced in the statements above quoted indicates that the judicial conception of an independent contractor is simply that of a person who, being in the exercise of a distinct and recognized trade, craft or business, undertakes to do a certain work, without submitting himself to the control of the employer in respect of the details of that work. Considered from one point of view, the situation contemplated when such a person is engaged implies that the employer has nothing to do in respect to the work, except to see that it is done according to the terms of the contract; or that he has merely a right to see that the contract is performed in pursuance of its terms, conditions and specifications. Considered from another point of view, that situation implies that he is to have the independent use of his own skill, judgment, means and

servants in the execution of the work, or that he is to have the exclusive direction and control of the manner in which the work is to be done, or that he is to have full control of the work and workmen, or that the execution of the work is to be left entirely to his discretion, or that he is to be free to exercise his own judgment and discretion as to the means and assistants that he may think proper to employ about the work, or that he is to be left entirely free to do the work as he pleases, or that the work is to be done according to his own methods, or that he is to procure labor and materials in his own way, provided they are such as the contract demands, and use such machinery and appliances as he deems proper, provided they do not unnecessarily injure the subject-matter of the contract or interfere with work done by others." Note to *RICHMOND v. SITTERDING* (1903, Va.), in 65 L. R. A. 447.

⁷⁴ *Rankin v. Dixon* (1847), 9 Scotch Sess. Cas., 2d. series, 1048; *Nisbett v. Dixon* (1852), 14 Id., 973; *Cleghorn v. Taylor* (1856), 18 Id., 664.

with reference to its methods and results.⁸¹ But, as will appear in the following sections, the question if retaining control or retaining the right to control is not the sole consideration in determining whether the relation is that of master and servant or of employer and independent contractor.⁸²

Sec. 19. Retaining Control.

In the leading case on this branch of the subject the trial court instructed the jury, *inter alia*: "The absolute test is not the exercise of power of control, but the right to exercise power of control. . . . Although the defendants should be across the Atlantic, nevertheless . . . if they retained the power to control and direct the work, they would be liable; because it is the possession of the right of interference, the right of control, that puts upon

⁸¹ SALLIOTTE v. KING, ETC., Co. (1903), 122 Fed. 378; 58 C. C. A. 466; 16 Am. Neg. Rep. 615, n.; 65 L. R. A. 620; LOUISVILLE, ETC., RAILROAD v. TOW (1901), 23 Ky. Law Rev. 408; 63 S. W. 27; 21 Am. & Eng. Ry. Cas. (N. S.), 441; 66 L. R. A. 941; Watson Lodge v. Drake (1895), 29 S. W. 632; 16 Ky. Law Rev. 669; Corrigan v. Elsinger (1900), 81 Minn. 42; 83 N. W. 492; Klages v. Gillette, etc., Co. (1902), 86 Minn. 458; 90 N. W. 1116; Appel v. Eaton, etc., Co. (1902), 97 Mo. App. 428; 71 S. W. 741; James McNeil & Co. v. Crucible, etc., Co. (1904), 207 Pa. St. 493; 56 Atl. 1067; Southern, etc., Co. v. Wallace (1899), 23 Tex. Civ. App. 12; 54 S. W. 638. "The question of control over the work, while

not conclusive in all cases upon the question of service, is to be regarded as a test of the greatest importance;" State v. Swayzee (1889), 52 N. J. Law 129; 18 Atl. 697.

⁸² "When a question arises as to whether a person performing work or doing business for another is a contractor for whose negligence the employer is not liable, or a servant for whose acts the employer is responsible, the character of the contract of employment, the nature of the business, and all the circumstances are to be considered in determining it." KNICELY v. WEST VIRGINIA, ETC., R. (1908, W. Va.), 61 S. E. 811; 17 L. R. A. (N. S.), syllabus by the court, citing Clapp v. Kemp (1877), 122 Mass. 481.

master is one who not only prescribes to the workman the end of his work, but directs, or at any moment may direct, the means also; or as it has been put 'retained the power of controlling the work.'"⁷⁸ Again it is said the true test by which to determine whether one who renders service for another, does so as a contractor or as a servant, is to ascertain whether he renders service in the course of an independent occupation in which he represents the will of his employer only as to the result of the work and not as to the means by which it is accomplished.⁷⁹ "The accepted doctrine is that in cases where the essential object of an agreement is the performance of work, the relation of master and servant will not be predicated, as between the party for whose benefit the work is to be done and the party who is to do the work, unless the former has retained the right to exercise control over the latter in respect to the manner in which the work is to be executed. . . . This attribute of the relation (*i. e.*, control), supplies . . . the single and universally applicable test by which the servants are distinguished from independent contractors."⁸⁰ Of course, the proprietor or employer is clearly liable where he interferes with and supervises the work of the contractor

⁷⁸ 2 Street Legal Liab. 468, citing Pollock on Torts, 6th ed., 78; Sadler v. Henlock (1855), 4 El. & Bl. 570, 578. But the retention by an employer, of general supervision of the work to be performed by an independent contractor will not change the contractor's relationship to the work; MILLER v. MORAN, ETC., Co. (1905), 39 Wash. 631; 81 Pac. 1089; 1 L. R. A. (N. S.), 283.

⁷⁹ CUNNINGHAM v. INTERNATIONAL RAILROAD Co. (1879), 51 Tex. 503; 32 Amer. Rep. 632.

"The test to be applied is whether the employee represents his employer as to the result of the work, or as to the means. If the former, he is to be regarded as an independent contractor; but if the latter, merely an agent or servant." Parrott v. Chicago, etc., Railroad (1905), 127 Iowa 419; 103 N. W. 352.

⁸⁰ Note to RICHMOND v. SITTERDING (1903), 101 Va. 354; 43 S. E. 562; 99 Amer. St. Rep. 879; 16 Am. Neg. Rep. 609, n.; 65 L. R. A. 445, at p. 447.

at the time and in the place of his master in accordance with and representing his master's will, and not his own. It must be strictly his employer's business that he is doing and not in any respect his own. If we find this to be the case, we may safely conclude, as a general rule, that the relation of master and servant exists, so as to render applicable the rule of law that the employer must indemnify and protect the agent he employs." ⁸⁵

⁸⁵ CORBIN v. AMERICAN MILLS (1858), 27 Conn. 275; 71 Amer. Dec. 63. In a note commenting on this case in 65 L. R. A., it is said: "The doctrinal position of the court is not very clearly indicated. If it is intended to deny the crucial character of the test supplied by the existence or absence of control, the case is manifestly opposed to the general current of the authorities. The latter part of the quotation seems to suggest that an employee must always be pronounced to be a servant, if it is found that he represents the will of the employer. But, according to the generally received view, this inference should be drawn only when the employer's will is represented as to the means used in performing the stipulated work." Other authorities bear out the text. "Whether a person employed to do certain work is to be regarded as a servant or as an independent contractor depends *mainly* upon whether, under the contract, the employer retains the power of directing and controlling the work. Where the employe is put in exclusive posses-

sion, and has exclusive control, furnishing his own assistants, and executing the work in detail, clear of any supervision, he is an independent contractor. It is otherwise if the employer retains the direction and control of the work. See the cases above cited." Tiff. Dom. Rels. p. 508, note 221. "Except in cases which involve the liabilities arising out of the torts of certain classes of agents, the existence or absence of a right to control over the details of the work in question must be the *appropriate* test by which it is to be determined whether the person employed to do that work is or is not an independent contractor." Note to RICHMOND v. SITTING (1903, Va.), in 65 L. R. A. 453. "A test which has been proposed and *generally* an *adequate* one, or as good a test put in a few words as can be suggested is, Had the defendant the right to control, in the given particular, the conduct of the person doing the wrong? If he had, the employer is liable; if not, he is not liable, for the reason that the one doing the act is an independent contractor." CARRICO

a party the duty of seeing that the person who stands in that relation does his duty properly. If they have retained to themselves the right of directing the mode of doing the work, then if the work is done wrong the simple principle is that they are responsible." On appeal, a verdict for \$5,500, under these instructions was upheld.⁸³ It is sometimes broadly stated that in *every* case the decisive question is, Had the defendant the right to control, in the given particular, the conduct of the wrong-doing party? Does he reserve the essential powers of a master?⁸⁴

But the general doctrine is more or less subject to qualifications. "The existence of actual present control and supervision on the part of the employer . . . is only a circumstance to be considered, though one of much weight. . . . To get at the truth we must look further and see if the person said to be a hired servant and agent is acting

⁸³ LINNEHAN v. ROBERTS (1884), 137 Mass. 123; 50 Amer. Rep. 287; 15 Am. Neg. Cas. 666, n.; Burd. Cas. Torts, 406. Such "employer is substantially a master and remains liable under the usual doctrines of master and servant." Huff. Agcy. 2d ed., sec. 226.

⁸⁴ Thomps. Neg. sec. 622, citing Morgan v. Smith (1893), 159 Mass. 570; 35 N. E. 101; 15 Am. Neg. Cas. 667, n.; Charlock v. Freel (1891), 125 N. Y. 357; 26 N. E. 262; Stephens v. Commissioners (1876), 3 Scotch Sess. Cas., 4th series, 535; LINNEHAN v. ROLLINS, *supra*; HEXAMER v. WEBB (1896), 101 N. Y. 377; 4 N. E. 755; 54 Amer. Rep. 703; Chase Cas. Torts 240; Carlson v. Stocking (1895), 91 Wisc. 432; 65 N. W. 58; Holmes v. Tennes-

see, etc., Railroad (1897), 49 La. Ann. 1465; 22 So. 403; 1 Am. Neg. Rep. 174; Burton v. Galveston, etc., Railroad (1884), 61 Tex. 526; 21 Am. & Eng. Ry. Cas. 218. Other authorities in effect likewise declare thus: In determining whether the relation is one of master and servant or of independent contractor, the *decisive* question is, had the defendant the right to control in the given particular the conduct of the person doing the wrong, Rait v. New England, etc., Co. (1896), 66 Minn. 76; 68 N. W. 729; the *ultimate* test whether the relation of master and servant exists is whether the right or duty to control exists, Roe v. Winston (1902), 86 Minn. 77; 90 N. W. 122.

guidance and control.⁸⁷ If a city, through its officers, reserve a general control over the contractor in respect of the mode and manner of doing the work, the city will be liable for the contractor's acts and omissions.⁸⁸ The doctrine has explicitly been recognized that unless the employer relinquishes his control over the work, the person employed to do the work is his agent or servant.⁸⁹ An instruction that, if the defendant employed an experienced contractor to perform a service, the defendant was not liable, was held erroneous, since it did not require the jury to find the work was being performed under an independent contract giving the contractor exclusive control over the work.⁹⁰ As in

⁸⁷ LINNEHAN v. ROLLINS (1884), 137 Mass. 123; 50 Amer. Rep. 237; Burd. Cas. Torts 400; 15 Am. Neg. Cas. 666, n.; Barg v. Bonsfield (1896), 65 Minn. 355; 68 N. W. 45; CONGREGATION v. SMITH (1894), 163 Pa. 561; 30 Atl. 279; 43 Amer. St. Rep. 808; 26 L. R. A. 504; 39 Amer. Cent. Law J. 452.

⁸⁸ Denver v. Rhodes (1886), 9 Colo. 554; 13 Pac. 729; SCHWARTZ v. GILMORE (1867), 45 Ills. 455; 92 Amer. Dec. 227; CHICAGO, ETC., RAILROAD v. MCCARTHY (1858), 20 Ills. 385; 71 Amer. Dec. 285; City of Chicago v. Joney (1871), 60 Ills. 387; 14 Am. Neg. Cas. 418, n.; Chicago v. Dermody (1871), 61 Ills. 431; 14 Am. Neg. Cas. 418, n.; Harper v. Milwaukee (1872), 30 Wisc. 365, 374; Hannon v. St. Louis Co. (1876), 62 Mo. 313; Cincinnati v. Stone (1855), 5 Ohio St. 38. It has been held that a general control by a city has the effect of rendering the city liable for the negligence of the contractor under the

rule of *respondeat superior*, even though the contract provides that the contractor shall save the city harmless from such liability; COOPER v. SEATTLE (1897), 16 Wash. 462; 47 Pac. 887; 58 Amer. St. Rep. 46; a decision which Judge Thompson declares is "opposed to the most rudimentary conceptions of justice." Thomp. Neg. p. 603. But a landowner who continues to manage and control the work of excavating under the wall of an adjoining building is liable, notwithstanding a contract with a third person for its performance, for damages resulting from the work; Duntun v. Niles (1892), 95 Cal. 494; 30 Pac. 762; Watson Lodge, etc., v. Drake (1895), 16 Ky. Law Rep. 669; 29 S. W. 632.

⁸⁹ Veazie v. Penobscot Railroad (1860), 49 Me. 119. The soundness of the rule as thus broadly asserted, is not unquestionable. See *post*, Sec. 24.

⁹⁰ Hearn v. Quillen (1901), 94 Md. 39; 50 Atl. 402.

In his Commentaries on Negligence, Judge Thompson states the rule thus: If the proprietor retains for himself or for his agent (*e. g.*, architect and superintendent) a general control over the work, not only with reference to *results*, but also with reference to *methods* of procedure, then the contractor is not deemed an independent contractor within the meaning of the rule under consideration, but he is deemed the mere agent or servant of the proprietor and the rule of *respondeat superior* operates to make the proprietor liable for his wrongful acts or those of his servants, whether the proprietor directly interfered with the work, and authorized and commanded the doing of such acts, or not.⁸⁶ It is not necessary in such a case, that the employer should actually guide and control the contractor. It is enough that the contract vests him with the right of

V. WEST VIRGINIA, ETC., RAILROAD Co. (1894), 39 W. Va. 86; 19 S. E. 571; 24 L. R. A. 50. This has been criticised as "guarded language that is to be ascribed merely to an exercise of judicial caution." Note in 65 L. R. A. 454.

⁸⁶ *Thomps. Neg.* sec. 659, citing *Mumby v. Bowden* (1889), 25 Fla. 454; 6 So. 453; *LINNEHAN v. ROLLINS* (1884), 137 Mass. 123; 50 Amer. Rep. 287; 15 Am. Neg. Cas. 666, n.; *Burd. Cas. Torts* 400; *St. Johns, etc., Railroad v. Shalley* (1894), 33 Fla. 397; 14 So. 890; compare, *LARSEN v. METROPOLITAN STREET RAILROAD* (1892), 110 Mo. 234; 19 S. W. 416; 16 L. R. A. 330; 33 Amer. St. Rep. 439; 45 Alb. Law J. 514; 34 Cent. Law J. 513. "The test by which to determine whether the person who negligently caused injury to an-

other was acting as an agent or employe of the person sought to be charged, or as an independent contractor is, did the person so sought to be charged have the right to control the conduct of the wrongdoer in the *manner* of doing the act resulting in such injury." *Gahagen v. Aermotor Co.* (1897), 67 Minn. 252; 69 Minn. 914; *Corrigan v. Elsinger* (1900), 81 Minn. 42; 83 Minn. 492. In a recent Canadian case the legal criterion as to reserving control is said to be whether the alleged master had a power of controlling the work which the alleged servant was doing for him "in respect to anything not necessarily involved in the proper doing of the work." *Saunders v. Toronto* (1899), 26 Ont. App. Rep. 265.

Massachusetts case ⁹⁴ it is said: "In such cases the party who employs the contractor indicates the work to be done and in that sense controls the servant, as he would control the contractor if he were present. But the person who receives such orders is not subject to the general orders of the party who gives them. He does his own business in his own way, and the orders which he receives simply point out to him the work which he or his master has undertaken to do. There is not that degree of intimacy and generality in the subjection of one to the other which is necessary in order to identify the two and to make the employer liable under the fiction that the act of the employed is his act. Of course, the chances are that some orders will be given which are not strictly within the contract of the master. That is to be expected from the relative positions of the servant and the other party. If the latter has something that he wants done and sees a working man at hand, he is likely to ask him to do it, and if it is within the penumbra of his business the servant is likely to obey. While he thus goes outside his master's undertaking and his own contract with his master, he ceases to represent him; ⁹⁵ and he may make the other liable for his acts, ⁹⁶ but he does not on that account become the servant of his master's contractee for all purposes, or when he

WELL (1908, Tex.), 109 S. W. 1089; 17 L. R. A. (N. S.), 758.

⁹⁴ Driscoll v. Towle (1902), 181 Mass. 416; 63 N. E. 922.

⁹⁵ Citing: BROWN v. ENGINEERING Co. (1896), 166 Mass. 75; 43 N. E. 1118; 32 L. R. A. 605; 55 Amer. St. Rep. 382; WYLLIE v. PALMER (1893), 137 N. Y. 248; 33 N. E. 381; 19 L. R. A. 285.

⁹⁶ Citing: KIMBALL v. CUSHMAN

(1869), 103 Mass. 194; 4 Amer. Rep. 528. In a United States case it was said to be "an important test of liability that the employer reserves the power, not only to direct what shall be done, but how it shall be done." New Orleans, etc., Railroad v. Hanning (1872), 15 Wall (U. S.), 649, 657; 7 Am. Neg. Cas. 309. Plainly this is a conclusive test.

the case of a proprietor employing an independent contractor, the contractor may make himself liable for the negligence of an independent subcontractor by having the work, during its progress, under a *quasi* supervision, as in a case where the principal contractor does work on other parts of the building, or accepts the work and pays for it by installments as it progresses.⁹¹ On the other hand it is always essential that the contractor or subcontractor should in fact be free from the control of the person employing him.⁹²

Sec. 20. How Far Retained.

A true test is said to be to ascertain whether the one rendering service to another does so in the course of an independent occupation, representing the employer's will only as to the result and not as to the means.⁹³ In a recent

⁹¹ *Bast v. Leonard* (1870), 15 Minn. 304.

⁹² *Ridgway v. Downing Co.* (1900), 109 Ga. 591; 34 S. E. 1028; 7 Am. Neg. Rep. 218; *BERG v. PARSONS* (1898), 156 N. Y. 109; 50 N. E. 957; 41 L. R. A. 391; 66 Amer. St. Rep. 542; 47 Cent. Law J. 237; 4 Am. Neg. Rep. 432.

⁹³ *ROME, ETC., RAILROAD v. CHASTEEN* (1889), 88 Ala. 591; 7 So. 94; 40 Amer. & Eng. Railroad Cas. 559; *POWELL v. VIRGINIA CONSTRUCTION Co.* (1890), 88 Tenn. 692; 13 S. W. 691; 17 Amer. St. Rep. 925; *BIBB v. NORFOLK, ETC., RAILROAD* (1891), 87 Va. 711; 14 S. E. 163; 47 Amer. & Eng. R. Cas. 651. For the meaning of result in the test commonly adopted declaring one to be an independent contractor who

is answerable to his employer only as to results, and not as to means, see *Jensen v. Barbour* (1895), 15 Mont. 582; 39 Pac. 906. As to what reservation of control is necessary, compare generally: *Blake v. Ferris* (1851), 5 N. Y. 48; 55 Amer. Dec. 304; *Leader v. Moxon* (1773), 3 Wils. 461; 2 W. Bl. 924; *DETROIT v. COREY* (1861), 9 Mich. 165; 80 Amer. Dec. 78, in which last case one judge dissents. "As to the right of supervision which will render the employer liable as master of the contractor," compare the cases cited in *Cooley on Torts*, Students' ed., 484, n. 51. That one doing the work without supervision on the part of the employer is an independent contractor; see *KAMPMANN v. ROTH-*

city as to make it liable for the negligence of the contractor and his servants.¹⁰⁰ Negligence in not shoring up the foundation of the plaintiff's house, where a subway was being constructed adjacent to it for the city by a contractor, was held to be that of the city, it appearing that the city retained the right to determine when any shoring up of foundations should be done, the contractor to receive extra pay therefor, and the city refused or neglected to authorize the shoring up of the house when the excavation was made.¹⁰¹

It is intimated in a Kentucky case that a contract whereby a railroad company employed a contracting company to do certain blasting at the top of a cut at the end of a tunnel did not of itself show that the contracting company was an independent contractor, as the terms of the contract (not reported) showed that the railroad company reserved the right to determine the extent of the excavation to be made and undertook to furnish a locomotive and train crew to transport the material removed.¹⁰² Where, in an agreement between a railroad company and a contractor it was stipulated that certain passenger trains were to be run under the direction of the company and under its control, the company was held liable for the value of a horse run over by such train.¹⁰³

The wrong-doing employee may have been a servant in one capacity and not in another. Thus, an owner will not be held to have abandoned or properly transferred the

¹⁰⁰ *Covington v. Geyler* (1891), 93 Ky. 275; 19 S. W. 741.

¹⁰¹ *Stork v. Philadelphia* (1900), 195 Pa. St. 101; 45 Atl. 678; 49 L. R. A. 600; (1901) 199 Pa. St. 462; 49 Atl. 236.

¹⁰² *Louisville, Etc., Railroad Co. v. Tow* (1901), 23 Ky. Law Rep. 408; 63 S. W. 27; 66 L. R. A.

941; 21 Amer. & Eng. Ry. Cas. (N. S.), 4411; see, also, *Speed v. Atlantic, etc., Railroad* (1879), 71 Mo. 303; 2 Amer. & Eng. R. Cas. 77; *Veazie v. Penobscot Railroad* (1860), 49 Me. 119.

¹⁰³ *Wyman v. Penobscot, etc., Railroad* (1858), 46 Me. 162.

returns to the work which the master agreed to perform." "It seems impossible to avoid the conclusion that there is, in not a few instances, an essential conflict of judicial opinion respecting the extent to which an employer is entitled to retain the power of directing the work without subjecting himself to the duties and liabilities of a master."⁹⁷

(a) Employer Liable.

If the employer retains the right to determine and direct the manner in which the work is to be done, to point out the dangers to be avoided, and to fix the extent to which the work shall be carried on, it does not matter that the work is let out by the job to one who supplies laborers and materials. The principal is the employer and not the contractor, and the latter and his laborers are the servants of the former.⁹⁸ Where a city charter gave the street commissioners authority to 'direct and control the persons employed' on the streets, and it was stipulated in the contract that the work was to be done 'under the direction of the street commissioners,' the city was held responsible for an injury to a traveler by the negligence of the contractor.⁹⁹ Where a city contracted for the erection of a building, and the contract provided that the work was to be done 'under the direction of the committees of the fire department and public buildings, representing the city council of said city, who shall have entire control over the manner of doing or shaping all and every part of said work,' this clause was held to reserve such control to the

⁹⁷ Note to *RICHMOND v. SITTING* (1903, Va.), in 65 L. R. A 485, citing authorities.

⁹⁸ *Atlantic Transportation Co v. Conely* (1897), 82 Fed. 177;

51 U. S. App. 570; Burd. Cas. Torts 403, note; *Railroad Co. v. Hanning*, *supra*.

⁹⁹ *ST. PAUL v. SEITZ* (1859), 3 Minn. 297; 73 Amer. Dec. 753.

a matter of fact, the situation thus supposed does not exist. If the employer has reserved the right of exercising control, the person employed is in law regarded as a servant even though his calling may for some purposes be independent."¹⁰⁷ On clearer grounds, the employer will be liable where his own agent, by and to whom he retains the supervision of the work, directs the doing of the particular act which causes the damage.¹⁰⁸ So, also, it is immaterial that the right is reserved to make alterations, deviations and omissions.¹⁰⁹ Where, under an arrangement with a master ore digger, a mineowner furnishes the appliances which are to be used by the digger's servants, the owner stands under the same duty to them that he would if they

¹⁰⁷ Note to *RICHMOND v. SITTERDING* (1903, Va.), in 65 L. R. A. 484, citing cases. There are cases in which the circumstances that the employer did, in point of fact, interfere and control the employes in the course of their work, has been mentioned as a cumulative element supporting the conclusion that they were mere servants; *Serandat v. Saisse* (1866), L. R. 1 P. C. 152; *Wallace v. Southern, etc., Co.* (1897), 91 Tex. 18; 40 S. W. 399. The independence of the contract is negatived where the evidence is that a person agreed to clear a piece of land at a certain price per acre, but that the employer watched the progress of the work, gave advice as to the setting of the fire to burn the timber and brushwood, and when he was told that a certain fence which extended to the plaintiff's land might take fire, said that it made no difference. *Johnston v. Hastie* (1870), 30 U. C., Q. B.

232. The inference that a man employed to make an excavation for a cellar, at a specified price per diem, and commissions on the outlay, was a contractor and not a servant, can not properly be drawn, where the employer's own evidence shows he was exercising control over him in respect to the manner in which the earth should be removed, so as to secure the safety of a house on the adjacent lot. *Mound City, etc., Co. v. Conlon* (1887), 92 Mo. 221; 4 S. W. 922.

¹⁰⁸ *LARSON v. METROPOLITAN STREET RAILROAD CO.* (1892), 110 Mo. 234; 19 S. W. 416; 16 L. R. A. 330; 33 Amer. St. Rep. 439; *Butts v. Mackey* (1883), 72 Hun (N. Y.), 562; 25 N. Y. Supp. 531; (1895), 147 N. Y. 715; 42 N. E. 722.

¹⁰⁹ *Green v. Soule* (1904), 145 Cal. 96; 78 Pac. 337; 17 Am. Neg. Rep. 8.

possession, management and control of a wrecked vessel by employing an independent contractor to raise it, although the person so employed be placed in the actual physical custody of the wreck.¹⁰⁴ In an early Ohio case it was held that the employee in question was a contractor for the carpenter work only on a building, and that as to the residue of the work he was merely the superintendent or agent of the defendant, where it appeared that the defendant engaged him to put up the entire building, employ all the men and endorse all their bills, that he engaged to do the carpenter work at a certain per cent. of the bill, and employ all the mechanics, etc.; that the defendant employed no one about the building, and gave the employee in question possession of the premises which he was to keep until the contract was executed; that the defendant was at the place of work once or twice a day, and directed him to keep everything safe; and that he had nothing to do with the mechanics.¹⁰⁵

Reserving, but not exercising, control seems to be immaterial. It was remarked in a New York case that while defendants might not have exercised power of control over the work of S. (alleged contractor), yet if they retained the right to exercise such power during the progress of the work, then within the authorities he was their servant and not their contractor.¹⁰⁶ So, where control is not reserved but is, nevertheless, exercised the independent character may be destroyed. "Since the *rationale* of the doctrine by which an employer is exempted from liability for the torts of an independent contractor is that, *ex hypothesi*, the latter is not under the control of the former with respect to the execution of the details of the stipulated work, it is clear that this doctrine is not applicable in cases where, as

¹⁰⁴ The Snark (1899), 68 Law T. (N. S.), 25.

¹⁰⁵ Samyn v. McCloskey (1853), 2 Ohio St. 536.

¹⁰⁶ Goldman v. Mason (1888), 18 N. Y. Super. R. 376; 2 N. Y. Supp. 337.

do a particular work reserving to himself no control over the manner in which the work shall be performed, except that it shall conform to a particular standard when completed, he is not liable for any injury which may occur to others by reason of any negligence of the person to whom the contract is let." ¹¹² "If the employer has no such personal control, but has merely the right to reject work that is ill done, or to stop work that is not properly being done, but has no power over the person or time of the workman or artisans employed, then he will not be their superior in the sense of the maxim *respondeat superior*, and not answerable for their fault or negligence." ¹¹³ It is said that a contractor is not deemed to have full control of the work of excavating a trench for a pipe line across a highway where the agreement provides that if the work is not done in a manner satisfactory to the superintendent of the contractee, he may put men in the trench at the contractor's

Am. & Eng. Ry. Cas. (N. S.), 827; 16 Amer. Neg. Rep. 610, n.; *Jaskoey v. Consolidated Gas Co.* (1901), 67 N. Y. Supp. 976; *Simonton v. Perry* (1901, Tex. Civ. App.), 62 S. W. 1090.

Reserving the general control as to the location and character of the work to be performed by another and his servants does not make the employer liable; *Teller v. Bay, etc., Dredging Co.* (1907, Cal.), 90 Pac. 942; 12 L. R. A. (N. S.), 267. In a Kansas case it is held that it is not essential that one engaging a contractor to produce a given result should reserve, or should interfere and take, complete or exclusive control over all features of the work, to render him liable as master of the contractor's servants; but the fact

that he possesses a limited or partial control to the extent of conditioning the work in many respects will not entail such liability if the contractor is left free to exercise his own will generally respecting methods and means. *Kansas City, etc., R. v. Loosley* (1907), 76 Kans. 103; 90 Pac. 990: Cf. *Northrup v. Hayward* (1906), 99 Minn. 299; 109 N. W. 241; *Wm. Cameron Co. v. Real-muto* (1907, Tex. Civ. App.), 100 S. W. 194.

¹¹² *Vincennes, etc., Co. v. White* (1890), 124 Ind. 376; 24 N. E. 747.

¹¹³ *Stephens v. Commissioners* (1876), 3 Sc. Sess. Cas., 4th series, 542; approved in *Saunders v. Toronto* (1889), 26 Ont. App. Rep. 265.

were his own servants. "The relation of master and servant does not cease to exist so long as the master reserves any control, or right of control, over the method and manner of doing the work, or the agencies by which it is to be effected." ¹¹⁰

(b) Employer not Liable.

The fact that the employer retains a general supervision over the place where the work is done and the right to inspect the work to see if it conforms with the contract, does not make him responsible for the contractor's negligence. ¹¹¹ Where one person lets a contract to another to

¹¹⁰ *Fell v. Rich Hill, etc., Co.* (1886), 23 Mo. App. 216; *Speed v. Atlantic, etc., Railroad* (1879), 71 Mo. 303, 308; 2 Amer. & Eng. R. Cas. 77.

Plaintiff was injured while operating defendant's unguarded lath mill. Defendant had a contract with T. whereby T. was to employ the men and defendant was to pay them out of the contract price, and T. was to receive the balance of the contract price. Defendant contended T. was an independent contractor. "But we can not concede that this result followed from the facts pleaded. T.'s relation to the defendant was rather that of agent than of independent contractor. Defendant did not lease or surrender to him the management or control of this department of its mill. It surrendered only the right to employ the persons needed to carry on the work. It still retained control as to the manner and mode

of doing the work, and control over the workmen employed by T. This, as we say, did not make T. an independent contractor. He was but the agent of defendant acting in this regard for and on its behalf." *BARCLAY v. PUGET SOUND, ETC., Co.* (1908), 48 Wash. 241; 93 Pac. 430; 16 L. R. A. (N. S.), 140, citing *JOHNSON v. SPEAR* (1889), 76 Mich. 139; 15 Amer. St. Rep. 298; 42 N. W. 1092.

¹¹¹ *Kelleher v. Schmitt, etc., Co.* (1904), 122 Iowa 635; 98 N. W. 482; 16 Am. Neg. Rep. 609, n.; *BOOMER v. WILBUR* (1899), 176 Mass. 482; 57 N. E. 1004; 53 L. R. A. 172; 8 Am. Neg. Rep. 246; *Vosbeck v. Kellogg* (1899), 78 Minn. 176; 80 N. W. 957; *Gayle v. Missouri, etc., Co.* (1903), 177 Mo. 427; 76 S. W. 987; *Cullom v. McKelvey* (1898), 49 N. Y. Supp. 669; *Hawke v. Brown* (1898), 50 N. Y. Supp. 1032; *Omaha, etc., Co. v. Hargadine* (1904, Nebr.), 98 N. W. 1071; 36

retention of control as makes the proprietor liable.¹¹⁹ Provisions in a contract subletting construction work which a contractor has undertaken to perform for the construction company (the principal contractor) placing the work under the supervision of the construction company's engineer, who has the power to discharge employees as the interests of the construction company demand, and to require the increase of the working force and direct its application; and requiring the contractor to furnish tools; and empowering him to suspend work and pay the employees as a protection against liens; and requiring the subcontractor to save the contractor harmless from the claims of third persons, do not create the relation of master and servant between the contractor and the subcontractor as distinguished from that of independent contractor.¹²⁰ It has been held that a municipal corporation by reserving the right to supervise the work of a contractor and requiring him to employ only its own citizens, does not thereby exercise such control of the work as to render it liable for the acts of his em-

¹¹⁹ *Wendler v. Equitable, etc., Society* (1897), 19 App. Div. 50; 45 N. Y. Supp. 86.

¹²⁰ *Good v. Johnson* (1907), 38 Colo. 440; 88 Pac. 439; 8 L. R. A. (N. S.), 896, citing *Rogers v. Florence Railroad Co.* (1899), 31 S. C. 378; 9 S. E. 1059; 39 Amer. & Eng. R. Cas. 348; *Pioneer, etc., Co. v. Hansen* (1898), 176 Ills. 100; 52 N. E. 17; 3 Am. Neg. Rep. 16; *Foster v. Chicago* (1902), 197 Ills. 264; 64 N. E. 322; *Mayhew v. Sullivan, etc., Co.* (1884), 76 Me. 100; 15 Am. Neg. Cas. 296, n.; *Morgan v. Smith* (1893), 159 Mass. 570; 35 N. E. 101; 15 Am. Neg. Cas. 667, n.;

Corrigan v. Elsinger (1900), 81 Minn. 42; 83 N. W. 492; *Uppington v. New York* (1901), 165 N. Y. 222; 59 N. E. 91; 53 L. R. A. 550; 8 Am. Neg. Rep. 366; *Harding v. Boston* (1895), 163 Mass. 14; 39 N. E. 411; *Hughes v. Cincinnati, etc., Railroad* (1883), 39 Ohio St. 461; 15 Amer. & Eng. R. Cas. 100; *Thomas v. Altoona, etc., Railroad Co.* (1899), 191 Pa. St. 361; 43 Atl. 215; 6 Am. Neg. Rep. 383; *Callan v. Bull* (1896), 113 Cal. 593; 45 Pac. 1017; *Blumb v. Kansas City* (1884), 84 Mo. 112; 54 Amer. Rep. 87; *Erie v. Caulkins* (1877), 85 Pa. 247; 27 Amer. Rep. 642.

expense to make the necessary change, and also that if the contractor fails to prosecute the work with due diligence, the contractee may finish the same and charge it to the contractor.¹¹⁴ A partial control over the work on the part of a municipal corporation, with a view of seeing to the accomplishment of certain results, does not establish the relation of master and servant between the corporation and the contractor where the general control in respect of its manner and method of execution, and the oversight and direction of the performance of the actual labor, remain in the contractor.¹¹⁵ A mere reservation of power to direct changes in the work being done by a contractor for a city does not render the city liable.¹¹⁶ A stipulation in a railway contract that the work was to be done in accordance with the plans, specifications and instructions furnished by the company was held not to take the case out of the general rule.¹¹⁷ The mere taking of a bond of indemnity from a contractor does not constitute such control as to render a city or other employer liable *per se*.¹¹⁸ Where the superintendent of a building, used for storing cotton, directs an employee of a contractor, engaged to paint the building, to leave only one window open at a time on going through upon a scaffold used by him in painting, because of the danger from fire by the entrance of sparks, it is not such

¹¹⁴ Washington, etc., Co. v. Wilkinson (1885, Pa.), 1 Cent. Rep. 637; 2 Atl. 338.

¹¹⁵ Norwalk, etc., Co. v. Norwalk (1893), 63 Conn. 495; 28 Atl. 32; Beatty v. Thielman (1890), 29 N. Y. St. Rep. 498; 8 N. Y. Supp. 645; Cary v. Chicago (1895), 60 Ills. App. 341.

¹¹⁶ ERIE v. CAULKINS (1877), 85 Pa. St. 247; 27 Amer. Rep. 642; Reed v. Allegheny City (1875), 79 Pa. St. 330; Pack v. New

York (1853), 8 N. Y. 222; Nevins v. Peoria (1866), 41 Ills. 502; 89 Am. Dec. 392. *Contra*, Harper v. Milwaukee (1872), 30 Wisc. 365.

¹¹⁷ Hunt v. Pennsylvania Railroad Co. (1866), 51 Pa. St. 475.

¹¹⁸ ERIE v. CAULKINS, *supra*; Stalder v. Huntington (1899), 153 Ind. 354; 53 N. E. 88; contractors had entered into an obligation with the city to save it harmless from damages arising out of their negligence.

case where it appears that the power of discharge was not an incident of the contract of employment.¹²⁶ Some courts in determining whether a given employee is a servant or an independent contractor take into consideration the manner of payment, whether by the day, etc., with power to discharge reserved, or by the piece or entire job.¹²⁷ Where a railroad company stipulates with the contractor for the construction of its road and its bridges that any foreman or laborer employed by the contractor, who shall execute his work in a faulty or unskillful manner, or be disrespectful or riotous in his conduct, shall be forthwith dismissed by the direction of the engineer of the railroad company, the latter does not so retain control of the independent contractor as to be liable thereby.¹²⁸

According to certain authorities, the conclusion that the employee was not an independent contractor is evident if he was liable to dismissal at any time, and the case is for the jury whenever there is such evidence, and when the remaining testimony is either ambiguous or tends to establish the same conclusion.¹²⁹ Where a house owner employed a blacksmith to adjust and secure a coal hole cover, he being subject to the employer's direction and control and liable to be dismissed at any time, such blacksmith is not an independent contractor for whose negligence the owner would not be liable.¹³⁰ It is said that the liability

the power to watch the general progress of the work and to dismiss incompetent workmen.

¹²⁶ *Pioneer, etc., Co. v. Hansen* (1898), 176 Ills. 100; 52 N. E. 17; 3 Am. Neg. Rep. 16.

¹²⁷ *Schular v. Hudson River Railroad Co.* (1862), 38 Barb., N. Y. 653.

¹²⁸ *Bayer v. Chicago, etc., Railroad* (1896), 68 Ills. App. 219.

¹²⁹ *Oldfield v. Furness* (1893), C. A. 58 J. P. 102; 9 Times L. R. 513; *Speed v. Atlantic, etc., Railroad* (1879), 71 Mo. 303; 3 Am. & Eng. R. Cas. 77; *Bernaer v. Hartman, etc., Co.* (1889), 33 Ills. App. 491; *Blake v. Thirst* (1863), 2 Hurl's. & C. 20; 32 L. J. Exch. 189.

¹³⁰ *DICKSON v. HOLLISTER* (1889), 123 Pa. 421; 16 Atl. 484; 10 Amer. St. Rep. 533.

ployees.¹²¹ The proprietor will not be responsible where he retains the general superintendence of the work, where the contractor engages to discharge any servant at his request, and where he reserves the right to terminate the contract.¹²²

Sec. 21. Right of Dismissal.

If the employer reserves the right of dismissing the contractor, such reservation is merely an element to be considered in determining whether, viewing the contract as a whole, the relation of independent contractor existed.¹²³ It is well settled that if the remaining provisions of a contract show it to be an independent one, the mere fact that the employer has reserved the right to cancel, annul or revoke it, or to suspend or re-let the work, if there is some specific ground for dissatisfaction, will not cast on him a master's responsibilities.¹²⁴ Even though the stipulations give the employer the right to insist upon the dismissal of incompetent workmen, the relation may remain that of employer and contractor.¹²⁵ It has been laid down that the relation of master and servant will not be inferred in a

¹²¹ *Harding v. Boston* (1895), 163 Mass. 14; 39 N. E. 411. This has been declared to be "difficult to reconcile with" the general principles governing such cases; 7 *Thomps. Neg.* p. 100.

¹²² *Schular v. Hudson River Railroad Co.* (1862), 38 Barb., N. Y. 653.

¹²³ *Morgan v. Bowman* (1856), 22 Mo. 538; *City of Chicago v. Joney* (1871), 60 Ills. 383; 14 *Amer. Neg. Cas.* 418, n.; *New Albany, etc., Mill v. Cooper* (1892), 131 Ind. 363; 30 N. E. 294; 14

Amer. Neg. Cas. 456; *Bayer v. Railroad Co.* (1896), 68 Ills. App. 219.

¹²⁴ See cases cited in note to *RICHMOND V. SITTERDING* (1903, Va.), in 65 L. R. A. p. 502.

¹²⁵ *UPPINGTON V. CITY OF NEW YORK* (1901), 165 N. Y. 222; 59 N. E. 91; 6 *Amer. Neg. Rep.* 366; 53 L. R. A. 550; *REEDIE V. LONDON, ETC., RAILROAD CO.* (1849), 4 Exch., W. H. & G., 244; 6 *Eng. Rail. & Corp. Cas.* 184; 4 *Amer. Neg. Rep.* 438, n.; 9 *Id.* 122, n.; in which the company was given

employer's agent has the right to supervise, inspect or superintend the work for the purpose of seeing that it is done according to specifications is, in effect, held in several cases not to amount to such reservation of control as to transform an (otherwise) independent contractor into a servant.¹³⁴ The independent nature of the contract is not overcome by simply providing that the work shall be 'under the supervision and subject to the approval' of the employer or his agent,¹³⁵ or 'done to the satisfaction' of the employer's representative.¹³⁶ If a municipality in letting the contract retains no control over the contractor except through an official, whose duty it is to see that the work is conducted according to contract, the city will not be liable for the contractor's negligence.¹³⁷ In general, where the

house is only authorized to direct the person employed in respect to the manner in which the work is to be executed, the latter is an independent contractor; *SCHOOL DISTRICT v. FUESS* (1881), 98 Pa. 600; 42 Amer. Rep. 627.

¹³⁴ *Murphy v. Ottawa* (1887), 13 Ont. R. 334; *Nevins v. Peoria* (1866), 41 Ills. 502; 89 Amer. Dec. 392; *Bayer v. Chicago, etc., Railroad* (1896), 68 Ills. App. 219; *New Albany, etc., Co. v. Cooper* (1891), 131 Ind. 363; 30 N. E. 294; 14 Am. Neg. Cas. 456; *Jaskoey v. Consolidated, etc., Co.* (1901), 33 Misc. (N. Y.), 790; 67 N. Y. Supp. 976; *Clare v. National, etc., Bank* (1875), 8 Jones & S. (N. Y.), 104; *Welsh v. Parrish* (1892), 148 Pa. 599; 24 Atl. 86. The mere fact that the proprietor requires the work to be done under the supervision and to the satisfaction of his representative

does not render him liable for the negligence of his contractor; *Indiana, etc., Co. v. Cray* (1897), 19 Ind. App. 565; 48 N. E. 803; *Thomas v. Altoona, etc., Railroad* (1899), 191 Pa. St. 361; 43 Atl. 215; 6 Am. Neg. Rep. 383.

¹³⁵ *Callan v. Bull* (1896), 113 Cal. 593; 45 Pac. 1017.

¹³⁶ *Eldred v. Mackie* (1901), 178 Mass. 1; 59 N. E. 673; *SMITH v. MILWAUKEE, etc., EXCHANGE* (1895), 91 Wisc. 360; 64 N. W. 1041, 30 L. R. A. 504; 51 Amer. St. Rep. 912.

¹³⁷ *Lenderink v. Rockford* (1904), 135 Mich. 531; 98 N. W. 4; 6 Am. Neg. Rep. 614, n.; and see, *McMullen v. New York* (1905), 93 N. Y. Supp. 772. Where the work was to be done "to the satisfaction and acceptance of the superintendent of sewers, and subject to his inspection and direction at all times,"

of a city is especially marked where the contract not only allows it to supervise the work, but gives the city official the power to discharge incompetent and disobedient employees.¹³¹ Where laborers are employed and paid directly by a railroad company for grading under directions of the company's chief engineer, and the laborers are subject to discharge when the work is delayed or improperly done, they are servants of the railroad company.¹³²

Sec. 22. Supervision or Approval by Employer.

On the other hand, an independent contractor is not converted into a servant by provisions in the contract which reserve to the employer certain rights of supervision and approval, during the progress of the work.¹³³ That the

¹³¹ Scott v. Springfield (1899), 81 Mo. App. 312.

¹³² St. Johns, etc., Railroad v. Shalley (1894), 33 Fla. 397; 14 So. 890. "Of all the tests which have been suggested, and the authorities are far from uniform, it would seem that this, the power of substitution of one man for another, is most satisfactory. It may not in all cases be as apparent as it is in this one that B. has no power to remove or differently employ the individual whom A. has selected and assigned to a special line of work, but when it does appear, the amount of control which B. exercises over the individual is surely insufficient to establish, even *pro hac vice*, the relation of master and servant." The Slingsley (1903), 120 Fed. 748. "In some cases, the test of liability for the servant's torts, in such cases as we have

been considering, has been declared to be, who has the right of selecting and discharging him? If this test is applied, the liability will be thrown in almost every case upon the general master." Burd. Torts, 139, citing NEW ORLEANS, ETC., RAILROAD V. NORWOOD (1885), 62 Miss. 565; 52 Amer. Rep. 191; Michael v. Stanton (1875), 3 Hun (N. Y.), 462; Burton v. Galveston, etc., Railroad (1884), 61 Tex. 526; 21 Am. & Eng. Ry. Cas. 218; The Slingsley, *supra*.

¹³³ Steel v. Southeastern Railroad Co. (1855), 16 C. B. 550; Casement v. Brown (1893), 148 U. S. 615; 13 Sup. Ct. Rep. 672; Thomas v. Altoona, etc., Railroad (1899), 191 Pa. 361; 43 Atl. 215; 6 Am. Neg. Rep. 383. Thus, where a superintendent chosen by a school district to superintend certain improvements in a school

or less to the contrary, see those referred to in the note below.¹⁴⁰

Sec. 23. Supervision or Approval by Architect.

When one contracts with a builder to erect a building or other structure on his land, according to certain plans and specifications, the contractor to furnish all materials and labor, and to be answerable to the owner only for certain results, he will be considered an independent contractor and not a servant, even though the work is supervised by an architect of the owner's selection.¹⁴¹ The mere fact that the proprietor of a building undergoing erection or repairs employs an architect to inspect the work, and see that it is constructed according to contract, does not render the owner liable for the negligence of the contractor or his servants in the prosecution of the work.¹⁴² But this provision in a contract for wrecking a building was held to reserve such control as to render the owner liable: "The whole of the work of demolition to be carried out according to the directions of the supervising architect, whose directions upon all points in dispute I agree to accept as final."¹⁴³

Pa. 464; 5 Amer. Rep. 389. Compare, *McCleary v. Kent* (1854), 3 Duer (N. Y. Super. Ct.), 27.

¹⁴⁰ *Treadwell v. New York* (1861), 1 Daly (N. Y. Com. P.), 128; *Martin v. Tribune Association* (1883), 30 Hun (N. Y.), 391; *Potter v. Seymour* (1859), 4 Bosw. (N. Y. Super. Ct.), 140.

¹⁴¹ *Jefferson v. Jameson, etc., Co.* (1897), 165 Ills. 138; 46 N. E. 272; *Casement v. Brown* (1893), 148 U. S. 615; 37 Law ed., 582; 13 Sup. Ct. R. 672; *Alexander v. Mandeville* (1889), 33 Ills. App. 589; *Whitney, etc., Co. v. O'Rourke* (1898), 68 Ills. App.

487; 172 Ills. 177; 50 N. E. 242. The contractors are regarded as independent, though the owner's superintendent is charged with the duty to see whether the contractors are carrying out their agreement; *Miller v. Merritt, etc., Co.* (1905), 211 Pa. 127; 60 Atl. 508.

¹⁴² *Geist v. Rothschild* (1900), 90 Ills. App. 324; *Frassi v. McDonald* (1898), 122 Cal. 400; 55 Pac. 139.

¹⁴³ *FAREN v. SELLARS* (1887), 39 La. Ann. 1011; 3 So. 363; 4 Amer. St. Rep. 256.

only control reserved is to require the work to be performed to conform to the contract, or to some prescribed standard, or to be done to the satisfaction of the employer's engineer or architect, the doctrine of independent contractor applies.¹³⁸ The United States Supreme Court has held that the independent nature of the contract is not destroyed by a provision that suitable material is to be furnished and a specified structure erected, subject to the daily approval of the employer's engineer.¹³⁹ For cases more

the city was held not responsible; *Harding v. Boston* (1895), 163 Mass. 14; 39 N. E. 411.

¹³⁸ *Vincennes, etc., Co. v. White* (1890), 124 Ind. 376; 24 N. E. 747; *Hughbanks v. Boston, etc., Co.* (1894), 90 Iowa 267; 60 N. W. 640; 14 Am. Neg. Cas. 592, n.; *Humpton v. Unterkircher* (1896), 97 Iowa 509; 66 N. W. 776; 14 Am. Neg. Cas. 595; *POWELL v. CONSTRUCTION Co.* (1890), 88 Tenn. 692; 13 S. W. 691; 17 Amer. St. Rep. 925; *Green v. Soule*, (1904), 145 Cal. 96; 78 Pac. 337; 17 Am. Neg. Rep. 8; *Pioneer, etc., Co. v. Hansen* (1898), 176 Ills. 100; 52 N. E. 17; 3 Am. Neg. R. 16. But where the contract provided: "The work to be done under the direction of the city civil engineer, or agent appointed by the city council for the same, who shall have entire control over the manner of doing and shaping all or any part of the same, and whose directions must be strictly obeyed," the defendant city was held liable for the negligence of the contractor in depositing a pile of stones so as to obstruct the flow of surface water

and flood the premises of an adjacent owner, partly on the principle of *respondet superior* and partly on the ground that the city owed a public duty to prevent or remove nuisances in its streets; *Cincinnati v. Stone*, (1855), 5 Ohio St. 38. A railroad company is liable for injuries in blasting for a tunnel where it in fact controls the work which results in the injury; *LOUISVILLE, ETC., RAILROAD v. TOW* (1901), 23 Ky. L. Rep. 408; 63 S. W. 27; 66 L. R. A. 941; 21 Am. & Eng. Ry. Cas. (N. S.), 441.

¹³⁹ *Casement v. Brown* (1893), 148 U. S. 615. But an instruction was approved which stated that where the work is split up in different contracts and the owner undertakes to supply one of the contractors with materials to be used in the execution of his contract, and no provision is made for supervising the work or erecting or maintaining guards around it, it is justifiable to infer that the owner reserved supervision and that his duty to protect the public had not been devolved on others; *HOMAN v. STANLEY* (1870), 66

dent contractor.¹⁴⁶ Where a railroad company employs a professional and practical bridge builder of large experience, to build a railway bridge across a river, reserving to its chief engineer the right to criticise both the methods of erection and the workmanship, but not to direct the methods by which the contractor should proceed, the railroad company is not liable for the acts of the contractor.¹⁴⁷ In an early English case, it was laid down that "the proprietor will not be responsible, even where he reserves the power, by his engineer, to direct generally *what* shall be done, if the injury springs from the *manner* of doing it."¹⁴⁸ On the other hand, in a recent Federal decision the employer of a contractor for the erection of a bridge was held liable where the work was done under the direct supervision of an engineer in his employ.¹⁴⁹

A contract between a municipal corporation and a contractor for the construction of a sewer, containing the provision: "All work to be commenced and carried on at such times and in such places and in such manner as the engineer shall direct," and requiring the contractor to dismiss from his employment all incompetent and unfaithful persons, was

¹⁴⁶ *ROGERS V. FLORENCE RAILROAD* (1889), 31 S. C. 378; 9 S. E. 1059; 39 Amer. & Eng. Rail. Cas. 348. That the chief engineer is conclusively presumed to have control of the work of grading a railway, see *Alabama, etc., Railroad v. Coskry* (1890), 92 Ala. 254; 9 So. 202.

¹⁴⁷ *BIBB V. NORFOLK, ETC., RAILROAD* (1891), 87 Va. 711; 14 S. E. 163; 47 Amer. & Eng. Rail. Cas. 651.

¹⁴⁸ *STEELE V. SOUTHEASTERN RAILROAD CO.* (1855), 16 C. B. 550.

¹⁴⁹ *SALLIOTTE V. KING, ETC., CO.*

(1903), 122 Fed. 378; 58 C. C. A. 466; 65 L. R. A. 620; 16 Am. Neg. Rep. 615, n. In an Iowa case, it was concluded that a grading contractor was a servant of a railroad company and not an independent contractor where he furnished his own tools, but performed the work under the direction and to the satisfaction of an engineer having power to terminate the contract whenever he deemed it for the best interest of the railroad company. *Parrott v. Chicago, etc., Railroad* (1905), 127 Iowa, 419; 103 N. W. 352.

And in a case under the Louisiana Code, a contractor engaged with a religious corporation to rebuild a cathedral, under the direction and superintendence of the architect appointed by the wardens; while the work was progressing, a tower fell, in consequence of defective materials or construction, injuring the contractor's servant. This servant recovered damages *in solido* against the contractor and the wardens.¹⁴⁴

Sec. 24. Supervision or Approval of Engineer.

As in many other subdivisions of the general rules pertaining to the employment of servants and independent contractors, there is a conflict of judicial opinion as to when the reservation of supervision and approval by the employer's engineer, of the work being performed by an employee, will render the latter a mere servant. Thus, it is held that a stipulation in a contract for constructing or repairing a railway, that the work is to be subject to the railway company's engineer's approval does not make the railway company a master over the contractor.¹⁴⁵ So, where a person contracted with a railroad company to grade a section of its road, the entire work to be done by his servants and laborers, but subject to the approval of the company's chief engineer, and under the direction of its assistant engineer, such person was considered an indepen-

¹⁴⁴ *Camp v. Church Wardens* (1852), 7 La. Ann. 321. This case was distinguished in a subsequent case on the ground that the church wardens were liable by reason of having reserved control of their architect's work. *Peyton v. Richards* (1856), 11 La. Ann. 62. "But if this raised the relation of master and servant

between the proprietor and contractor, then how could a judgment be rendered against the contractors who had done no more than obey orders, the work not being wrongful *per se*?" *Thomp. Neg.*, Sec. 662, note 62.

¹⁴⁵ *Alabama, etc., Railroad v. Martin* (1893), 100 Ala. 511; 14 So. 401.

Sec. 25. Purpose of Retaining Control.

If these provisions (reserving right of supervision and approval) are for the purpose of securing faithful compliance with the specifications on the part of the contractor, the relation remains that of employer and independent contractor, though the stipulations give the employer the right to reject work or material which does not conform to the specifications, or to stop the work.¹⁵³ The proprietor is not liable merely because he retains a supervision of the work simply for the purpose of securing certain results.¹⁵⁴ A learned annotator has lately said: "Where the substantial effect of the evidence is that the person employed was engaged in some occupation which might, in a reasonable sense, be described as distinct, and that he undertook to execute a particular piece of work for a specified price, calculated with reference to the quantity of work actually performed, it is, as a general rule, an inference, in point of law, that the employer did not intend to exercise any control over the work while it was in progress but merely reserved the right to reject the results produced thereby."¹⁵⁵

¹⁵³ *Stephen v. Commissioners* (1876), 3 Sc. Sess. Cases, 4th series, 535, 542; *Vosbeck v. Kellogg* (1899), 78 Minn. 176; 80 N. W. 957; *Blumb v. City of Kansas* (1884), 84 Mo. 112; 54 Amer. Rep. 87.

¹⁵⁴ *BIBB v. NORFOLK, ETC., RAILROAD* (1891), 87 Va. 711; 14 S. E. 163; 47 Amer. & Eng. Rail. Cas. 651. "The mere fact that the proprietor retains a general supervision over the work for the purpose of satisfying himself that the contractor carries out the

stipulations of his contract, does not make him responsible for wrongs done to third persons in the prosecution of the work." *Thomp. Neg.*, Sec. 660. A city is not liable where the provisions of the contract with the contractor relate to results and not to the methods employed. *Foster v. Chicago* (1902), 197 Ills. 264; 64 N. E. 322.

¹⁵⁵ Mr. C. B. Labatt, in note to *RICHMOND v. SITTING* (1903, Va.), 65 L. R. A. 461.

held not to reduce the contractor to the grade of a servant of the city so as to make it answerable for his negligence.¹⁵⁰ In an Indiana case where a city was constructing a water pipe trench and a laborer employed under the direction of the city's inspector and superintendent was assigned to the excavation of a section of the trench, but he had no authority or discretion as to his work, he was held to be a servant and not an independent contractor.¹⁵¹ A subcontractor of an improvement company, which has contracted with a railroad company to build and equip its line of road, the work to be done subject to the approval of the railroad company's chief engineer is an independent contractor.¹⁵²

¹⁵⁰ *ERIE V. CAULKINS* (1877), 85 Pa. St. 247; 27 Am. Dec. 642. In a late Illinois case where a city's contract for the construction of a tunnel provided that all labor performed should be subject to the inspection of the commissioners of public works, it was held that the city was liable for the negligence of an independent contractor in doing the work. *CHICAGO V. MURDOCK* (1904), 212 Ills. 9; 72 N. E. 46; 103 Amer. St. Rep. 221. See, *post*, Chap. V., Secs. 139-146. One whose bid for a street improvement has been accepted and who has in part performed the work under the direction of the city's engineer and street committee, does not become an independent contractor so as to exempt the city from liability for an accident sustained because of a road obstruction, although thereafter a formal independent contract is tendered to

him for signature. *HOOKEY V. OAKDALE* (1895), 29 Pitts. L. J. (N. S.), 453.

¹⁵¹ *FORT WAYNE V. CHRISTIE* (1901), 156 Ind. 172; 59 N. E. 385.

¹⁵² *Alabama, etc., Railroad v. Martin* (1893), 100 Ala. 511; 14 So. 401. Where such a contract specified that the grounds should be cleared of all perishable materials, which should be removed or burned, as the engineer of the company might direct, and the engineer directed the burning of a pile of brush, but it was so negligently done by a subcontractor of the principal contractor that damage ensued to an adjacent owner, the company was held not liable. *Callahan v. Burlington, etc., Railroad* (1876), 23 Iowa, 562. Cf. *WRIGHT V. HOLBROOK* (1872), 52 N. H. 120; 13 Amer. Rep. 12.

Sec. 27. Construction of Contract of Employment.

Whether the employer retains such control over the work to be done, and the manner of doing it, as to render himself responsible for injuries occasioned by the negligence of the employee (or contractor) in the performance of the work depends upon the construction to be given to the contract.¹⁵⁹ "It is apparent from what has been said, that whether the relation in a particular case is that of

most an element to be considered by the jury. There is no such intimate or invariable connection between the power of controlling the details of the work and the power of controlling the premises on which the work is done, that the exercise of the latter power necessarily implies the exercise of the former power as well. It seems certain at all events that, in cases where only a portion of the premises is affected by the performance of the work, the fact that the employer retained control over them is inconclusive, if not wholly immaterial." Note to *RICHMOND v. SITTERDING*, *supra*, p. 504, citing *BOOMER v. WILBUR* (1900), 176 Mass. 482; 57 N. E. 1004; 53 L. R. A. 172; 8 Am. Neg. Rep. 246; *Mumby v. Bowden* (1889), 25 Fla. 454; 6 So. 453; *Louthan v. Hewes* (1902), 138 Cal. 116; 70 Pac. 1065; 16 Am. Neg. Rep. 613, n. Defendant company owning standing timber contracted with F. to cut and remove same, and agreed to furnish him a locomotive, cars, horses, etc., and to pay him at certain rates for all timber logged. F. was to have full control over the cutting

and hauling and defendant was to have no control, and F. was to "do said work in a good, workmanlike manner as an independent contractor." F. shortly began cutting the timber. Plaintiff, aged nine, and his father lived on land whereon trees were being cut. The father sent plaintiff along a path to a spring to get water and while on the way she was struck by a tree felled by the hands sawing trees, "Assuming that the contract was made in good faith and was not a mere colorable device, resorted to for the purpose of avoiding responsibility for F.'s acts, we are of the opinion that it constituted F. an independent contractor." *YOUNG v. FOSBURGH LUMBER CO.* (1908), 147 N. C. 26; 60 S. E. 654; 16 L. R. A. (N. S.), 255, citing *Craft v. Albemarle, etc., Co.* (1903), 132 N. C. 151; 43 S. E. 597; 30 Am. & Eng. Ry. Cas. (N. S.), 84; 16 Amer. Neg. Rep. 615, n.

¹⁵⁹ Huff. Agcy., 2d ed., Sec. 218, citing *LINNEHAN v. ROLLINS* (1884), 137 Mass. 123; 50 Amer. Rep. 287; *Burd. Cas. Torts*, 400; 15 Am. Neg. Cas. 666, n.

Sec. 26. Surrendering or Retaining Control of Premises.

The authority last quoted adds: "With respect to that large class of cases in which the stipulated work is to be done on the premises of the contractor (contractee?) it may be laid down as a general rule that, whenever it is understood or expressly provided, that the possession and control of those premises are to be surrendered to the contractor while the work is in progress, the independence of the contract should be inferred, as a matter of law, unless there is some specific evidence which points to the opposite conclusion."¹⁵⁶ Thus, testimony to the effect that one employed to erect a building was given possession of the premises in question will be disregarded if it appears from other facts that he was acting as the employer's superintendent, and merely occupied the premises as mechanics usually do when making improvements.¹⁵⁷ Further, it is clear that an employee's torts "can not be imputed to the employer on the mere ground that, while the work was in progress, the latter retained, with respect to his premises, that ultimate right of control which is an inseparable incident of proprietorship."¹⁵⁸

¹⁵⁶ Note to *RICHMOND v. SITTERDING* (1903, Va.), 65 L. R. A. 502, citing cases, *inter alia* *Byrnes v. Western* (1896), 17 New South Wales, L. R., 80; *HAWVER v. WHALEN* (1892), 49 Ohio St. 69; 29 N. E. 1049; 14 L. R. A. 828. In order that the employer may escape liability on the ground of his having surrendered possession of his premises, it is merely necessary to show that the possession given was such as would enable the contractor to carry out the contract; such possession need not be exclusive. *Id.*, citing cases.

¹⁵⁷ *Samyn v. McClosky* (1853), 2 Ohio St. 536.

¹⁵⁸ Note to *RICHMOND v. SITTERDING*, *supra*, at p. 504. "In Illinois the doctrine seems to have been adopted that this situation is incompatible with any other conclusion than that the person employed was a servant." *Id.*, citing *GLICKAUF v. MAURER* (1874), 75 Ills. 289; 20 Amer. Rep. 238; *Bernaer v. Hartman, etc., Co.* (1889), 33 Ills. App. 491. "The more correct theory, however, would seem to be that such evidence constitutes at the very

in the employee's contract "that he shall not use the employer's name in any manner whereby any one may be led to believe that the employer is responsible for his acts," was held by the United States Supreme Court not to relieve the employer at all of liability for his negligence if in fact the employee was a servant.¹⁶³

Though payment for work "by the job" and the right and power of the person doing the work to employ assistants, to be paid by himself, are circumstances tending to prove the relation of contractor and contractee, and so make him an independent contractor, they are not conclusive and must yield, if it appears that he is merely working under a general employment, having no dominion or control over the premises, subject at all times to the employer's orders as to when and how he shall work and the results to be accomplished and may be discharged at any time. Under such circumstances the relation of master and servant exists.¹⁶⁴ It is clear that "one does not become an independent contractor simply because the writing so styles him. Whether he is one depends upon the terms upon which he, in truth, enters upon (the work he is to perform). If as a fact, notwithstanding the language of the writing, the defendant (employer) exercises a control over him in the selection and

done under the direction of the employer or his agent does not alone destroy the independent nature of the contract—"is that the question whether the person employed was an independent contractor or a mere servant is not to be determined by the retention of a certain kind or degree of supervision by the employer, but by the contract as a whole, by its spirit and essence, and not by the phraseology of a single sentence or paragraph. If the result of ap-

plying this test is to render it reasonably certain that the intention of the parties was to enter into an independent contract, the words above specified will be construed as being (such as relate) to the results contemplated and not to the methods employed." Exhaustive note to *RICHMOND v. SITTINGDING*, *supra*, p. 480.

¹⁶³ *SINGER MANUFACTURING CO. v. RAHN* (1889), 132 U. S. 518; *Huff. Cas. Agcy.*, 9.

¹⁶⁴ *KNICELY v. WEST VIRGINIA*,

employer and independent contractor, or of master and servant, depends on the terms of the contract, in the absence of legislation.”¹⁶⁰ Whether such full control is reserved as will constitute the employer a master, it has been held, must depend in each case upon a just interpretation of the contract itself, as shown in the decisions cited herein.¹⁶¹

The judges themselves do not always agree *inter se*. Thus, in a contract for laying gas pipe, two judges held there was nothing from which the relation of master and servant could be gathered, while a third judge dissented on the ground that certain provisions made it plain that the defendant's inspector was to have full control over the means adopted for the protection of the gas and water pipes out of which the accident occurred.¹⁶² A provision

¹⁶⁰ Burd. Torts, p. 134, citing Cargill v. Duffy (1903), 123 Fed. 721.

¹⁶¹ See *ERIE v. CAULKINS* (1877), 85 Pa. St. 250; 27 Amer. Rep. 642, per Gordon, J. *Contra, q. v.*, *Railroad Co. v. Hanning* (1872), 15 Wall. 649; 7 Am. Neg. Cas. 309. Where an extension of the work is ordered by the city engineer, under the terms of a contract, the contractor in executing such extension will be deemed an independent contractor, if the terms of the original contract make him so. *Charlock v. Freel* (1891), 125 N. Y. 357; 34 N. Y. St. R. 971; 26 N. E. 262. A mine owner is not relieved of liability for injuries to employees through the incompetency of the engineer, by a lease of the mine, which is shown to be nothing but a form adopted by the owner to carry on its business in the name

of another, the owner still having full control and charge of the mine and work therein. *Consolidated, etc., Co. v. Seniger* (1899), 179 Ills. 370; 53 N. E. 733. It is also immaterial whether the work contracted for be done by the contractor himself, his servants or a subcontractor and his employees; the terms of the contract are decisive of the question whether the relation of contractor or servant is created. *McHARGE v. NEWCOMER* (1907), 117 Tenn. 595; 100 S. W. 700; 9 L. R. A. (N. S.), 298.

¹⁶² *Hardaker v. Idle District, etc.* (1896), 1 Q. B. 335. Compare *Norwalk, etc., Co. v. Norwalk* (1893), 63 Conn. 495; 28 Atl. 32; *Harding v. Boston* (1895), 163 Mass. 14; 39 N. E. 411. “The rationale of the cases”—holding that the provision that the work or certain parts of it shall be

construction work on a railroad track, between the parties thereto, is *exclusively* a question for the court.¹⁶⁸ Not alone if the contract is in writing, but even though it is oral, if but one inference can be drawn from the evidence, the question whether the relation is that of employer and independent contractor or that of master and servant is presented for the court.¹⁶⁹ But it can not be said, as a matter of law, that a member of a firm of transfer agents, permitted by a railroad company to check baggage on its trains, is its employee under the Kentucky statute relating to recovery of damages in fatal accidents.¹⁷⁰

Sec. 29. Construction: Question for Jury.

It is frequently asserted that whether the relation of master and servant exists in a given case is usually a ques-

independent contractor to the jury. In one aspect of the question this was error. The construction of the language of the (written) contract being free from ambiguity, was for the court." *YOUNG v. FOSBURGH LUMBER CO.* (1908, N. C.), 60 S. E. 654; 16 L. R. A. (N. S.), 255.

¹⁶⁸ *GOOD v. JOHNSON* (1907), 38 Colo. 440; 88 Pac. 439; 8 L. R. A. (N. S.), 896, in which the relation in question was between a contractor and a subcontractor.

¹⁶⁹ *Sadler v. Henlock* (1855), 4 El. & Bl. 570; *Adams Express Co. v. Schofield* (1901), 111 Ky. 8; 32 S. W. 903; *LEAVITT v. BANGOR, ETC., RAILROAD* (1897), 89 Me. 509; 36 Atl. 998; 36 L. R. A. 382; 7 Am. & Eng. Ry. Cas. 354; 1 Am. Neg. Rep. 605; *BOOMER v. WILBUR* (1899), 176 Mass. 482; 57 N. E. 1004; 53 L. R. A. 172; 8 Am. Neg. Rep. 246; *Vosbeck*

v. Kellogg, supra; *Allen v. Willard, supra*; *SANFORD v. PAW-TUCKET, ETC., RAILROAD* (1896), 19 R. I. 537; 35 Atl. 67; 33 L. R. A. 564; 4 Amer. & Eng. Railroad Cas. (N. S.), 318; *SINGER MANUFACTURING CO. v. RAHN, supra*. The relation of employer and independent contractor was held to be inferable as a matter of law, where the defendant had leased to H. certain lands to work on shares and agreed to pay H. so much per acre for clearing whatever part he chose to clear. *FERGUSON v. HUBBELL* (1884), 97 N. Y. 507; 49 Amer. Rep. 544; such persons are not the landlord's servants or agents. See, also, *Duncan v. Anderson* (1876), 56 Ga. 398.

¹⁷⁰ *Mefford v. Louisville, etc., Railroad* (1892), 14 Ky. L. Rep. 327; 20 S. W. 263.

employment of the laborers, if defendant pays them and directs the manner in which they perform the service; in other words, if the writing does not truthfully set forth the agreement between the employee and defendant, and the jury should so find, then he is not an independent contractor." ¹⁶⁵

Sec. 28. Construction: Question for Court.

"What constitutes an independent employment so as to make the person engaged in the employment an independent contractor within the meaning of the rule under consideration, is a question of law for the court, and not a question of fact for the jury; but, as in other cases, subject to the rule that the jury are to determine the facts on which the decision of the question of law is to be made." ¹⁶⁶ The question depends upon the terms of the contract, and when the contract is in writing it is one of law for the court. ¹⁶⁷ Thus, the relation created by a written contract for the

ETC., Co. (1908, W. Va.), 61 S. E. 811; 17 L. R. A. (N. S.), 370, syllabus by court, citing Northern, etc., R. v. Peterson (1896), 162 U. S. 346; JACKSON v. NORFOLK, ETC., R. (1897), 43 W. Va. 380; 27 S. E. 278; 31 S. E. 258; 46 L. R. A. 337. Cf., as to volunteers, PENNSYLVANIA CO. v. GALLAGHER (1884), 40 Ohio St. 637; 48 Amer. Rep. 689; Saunders v. Coleridge (1896, D. C.), 72 Fed. 676; EWAN v. LIPPINCOTT (1885), 47 N. J. L. 192; 54 Amer. Rep. 148. "In the law of liability for negligence, independency of contract and servancy bear to each the relation of opposition; they are incompatible; where one exists the other can

not." KNICELY v. WEST VIRGINIA, ETC., R., *supra*.

¹⁶⁶ YOUNG v. FOSBURGH LUMBER Co. (1908, N. C.), 60 S. E. 654; 16 L. R. A. (N. S.), 255.

¹⁶⁸ Thomps. Neg., Sec. 640, citing Emmerson v. Fay (1896), 94 Va. 60; 26 S. E. 386; also cited in Barrows Neg., 161.

¹⁶⁷ Hughbanks v. Boston, etc., Co. (1894), 94 Iowa, 267; 60 N. W. 640; 14 Am. Neg. Cas. 592, n; Vosbeck v. Kellogg (1899), 78 Minn. 176, 181; 80 N. W. 957; Allen v. Willard (1868), 57 Pa. St. 374, 382; SINGER MANUFACTURING Co. v. RAHN (1889), 132 U. S. 518; 10 Sup. Ct. 176; Huff. Cas. Agcy., 9. "His Honor left the question whether F. was an

ference can fairly be drawn from the evidence, the question should go to the jury whether the relation is that of employer and independent contractor or that of master and servant.¹⁷³ If, for example, the evidence does not show clearly that A's servant has been put, for the time being, under the control of B., a question of fact for the jury, as to whether A. or B. is the master, seems to be presented.¹⁷⁴ In an English case, the question whether the defendant employer was liable was held properly submitted to the jury in the case of unloading a ship.¹⁷⁵ Where the contract, as related by witnesses, is so incomplete as to lead to the

¹⁷³ Burd. Torts, 135, citing cases cited in last preceding note. In *Dutton v. Amesbury National Bank* (1902), 181 Mass. 154, 62 N. E. 405, the majority of the court thought but one inference was warrantable while one judge thought two could be drawn. See further, cases cited in Sec. 27, note 162, *supra*.

¹⁷⁴ *Howard v. Ludwig* (1902), 171 N. Y. 507, 64 N. E. 172, in which the minority of the court thought the evidence did not warrant the inference that the wrongdoer was the servant of the defendant, but showed clearly that he remained the servant of his general master, the Univ. Express Company. See, also, *Ward v. New England Fibre Co.* (1891), 154 Mass. 419; 28 N. E. 299. In a case in which the removal of lateral support damaged a building, it was held properly refused to hold upon the evidence that the defendants, the principal contractors for the erection of the building, were not liable by rea-

son of their arrangement with one K. as to the excavations, where K. was to be paid by the yard for excavations he made, it being his duty to follow defendants' directions from time to time as to where and when to dig, defendants supervising the work and another employee giving directions to the men there. *Hart v. Ryan* (1889), 3 Silv. Sup. Ct. (N. Y.), 415; 6 N. Y. Supp. 921. In Pennsylvania the character of the relation between a stevedore and his employer has been held to be one for the jury in two cases where the question was whether the crew of the ship and the stevedore's workmen were co-servants. *MULLAN v. PHILADELPHIA, ETC., Co.* (1875), 78 Pa. 25; 21 Amer. Rep. 2; *Hass v. Philadelphia, etc., Co.* (1879), 88 Pa. 269; 32 Amer. Rep. 462.

¹⁷⁵ *Ruth v. Surrey Dock Co.* (1891), 8 Times L. R. 116. But see *Charles v. Taylor* (1878), L. R., 3 C. P. D. 492.

tion of fact.¹⁷¹ Where the contract is oral and the evidence is conflicting, or where the written contract has become modified by the practice under it, the question as to what relation exists is for the jury under proper instructions.¹⁷² If the contract is oral, and if more than one in-

¹⁷¹ *Bernstein v. Roth* (1893), 145 Ills. 189; 34 N. E. 37; *SACHER v. WADDELL* (1903), 98 Md. 43; 56 Atl. 399; 103 Amer. St. Rep. 374. Retaining control of premises may be a matter of fact for the jury; see *ante*, Sec. 26. Whether in the case at bar the licensee company had created the alleged nuisance (a defective railway bridge on a track built by the licensee company to connect its system with defendant's) and had sole possession and use of that track thenceforward until the occurrence of the injury complained of, was held to be a question of fact for the jury. *Gwathney v. Little Miami Railroad* (1861), 12 Ohio St. 92. Cf. *Regina v. Gibbs* (1855), 6 Cox C. C. 455. So, also, as to whether control was actually exercised over the employee is primarily for the jury; see *post*, Sec. —.

¹⁷² *Overhouser v. American, etc., Co.* (1902), 118 Iowa, 417; 92 N. W. 74; *Driscoll v. Towle* (1902), 181 Mass. 416; 63 N. E. 922; *Rait v. New England, etc., Co.* (1896), 66 Minn. 76; 68 N. W. 729; *Klages v. Gillette, etc., Co.* (1902), 86 Minn. 458; 90 N. W. 1116; *Gayle v. Missouri, etc., Co.* (1903), 177 Mo. 427; 76 S. W. 987; *Howard v. Ludwig* (1902), 171 N. Y. 507; 64 S. E. 172;

Wallace v. Southern, etc., Co. (1897), 91 Tex. 18; 40 S. W. 399; *Emmerson v. Fay* (1896), 94 Va. 60; 26 S. E. 386. The question whether the tort-feasor was an independent contractor or a servant, is for the jury where there is testimony on one side that he supplied his own men and horses, and was hired by the hour to do all of defendant's trucking, and on the other that he was under their foreman's control, subject to his orders and direction both as to what to do and how to do it, and that the foreman had authority over his men. *Brophy v. Bartlett* (1888), 1 Silv. Ct. App. 475, reversing 37 Hun (N. Y.), 642. Whether one who is supervising a department of a factory is a servant of the owner or an independent contractor, is a question for the jury where he testifies that he was paid by the gross for articles turned out of his department and paid his subordinates out of the sums thus received, but also states that he was only the foreman for that department and under the superintendent. *Latorre v. Central, etc., Co.* (1896), 9 App. Div. (N. Y.), 145; 41 N. Y. Supp. 99. Cf., generally, *Wallace v. Southern, etc., Co.* (1897), 91 Tex. 18; 40 S. W. 399.

is limited to indicating the work to be done and does not extend to directing how it shall be done, then A. and not B. is answerable for the servant's torts.¹⁷⁹ "The true principle of law is that if I lend my servant to a contractor, who is to have the sole control and superintendence of the work contracted for, the independent contractor is alone liable for any wrongful act done by the servant while so employed. The servant is doing, not my work, but the work of the independent contractor."¹⁸⁰

¹⁷⁹ Jones v. Mayor, etc. (1885), 14 Q. B. D. 890; 54 L. J., Q. B., 345; Cameron v. Nystrom (1893), A. C. 308; 62 L. J., P. C., 85; STEWART v. CALIFORNIA, ETC., Co. (1900), 131 Cal. 125; 63 Pac. 177; Burd. Cas. 412; Wood v. Cobb, (1866), 13 Allen, 95 Mass. 58; MURRAY v. DWIGHT (1900), 161 N. Y. 301; 55 N. E. 901; 48 L. R. A. 673. The dissenting opinion in the case last cited is based on the view that the servant of the contractor was subject to the control of the defendant. Cf., Quinn v. Complete Electric Co. (1891), 46 Fed. 506. "It may be observed, however, that there is a class of cases in which, although it may be apparent that the person employed was himself an independent contractor, there is still an ulterior question to be settled, viz., whether the men who were engaged in doing the work, which was the immediate cause of the injury, were at the time when the injury was received under his control or under the control of the employer. If the latter should be the situation established by the evidence, the employer is

plainly liable, and the independence of the contract ceases to be a differentiating factor." Note to RICHMOND v. SITTING (1903, Va.), 65 L. R. A. 458, referring to 37 L. R. A. 33, especially p. 69, *et seq.* Where the plaintiff was injured by the negligent management of moving railway cars, while he was working for a man who had contracted to discharge coal from cars standing on a siding, the discussion was centered wholly upon the question whether the defendant company exercised such a control over the plaintiff and his fellow-servants as to make them its own servants *ad hanc vicem*. Turner v. Great Eastern Railroad Co. (1875), 33 L. T. (N. S.), 431.

¹⁸⁰ Brett, J., in Murray v. Currie (1870), L. R., 6 C. P. 24. Prof. Burdick calls this the true test; Burd. Torts, 139. Where steamboat owners were sued for the negligence of those operating, the trial court was held to have erred in rejecting evidence tending to show a transfer of control by the owner. Gulzoni v. Tyler (1883), 64 Cal. 334; 30 Pac. 981.

conclusion that it was a mere subterfuge to avoid liability, or an afterthought on the part of the witness, it is properly submitted to the jury. ¹⁷⁶

Sec. 30. Identity of Employer and Independent Contractor.

A recent decision in the plaintiff's favor was based partly on the ground that the injury was due to the negligence of a construction company expressly organized to do the work, and it and the defendant company employing it were controlled and managed by the same persons. ¹⁷⁷ The fact that a boss cartman, under contract to do a firm's trucking, being at the same time engaged in similar work for others, owning his own wagons and teams and employing his own drivers, has a place of business on such firm's premises, does not affect his relationship as an independent contractor. ¹⁷⁸

Sec. 31. Whose Servant the Wrongdoer Is.

If in the transaction A. sustains the relation of independent contractor to B. so that the latter's right of control

¹⁷⁶ *Johnson v. Great Northern, etc., Co.* (1908), 48 Wash. 325; 93 Pac. 516. Cf. *DeCola v. Cowan* (1906), 102 Md. 551; 62 Atl. 1025.

¹⁷⁷ *Chicago, etc., Co. v. Myers* (1897), 168 Ills. 139; 48 N. E. 66. Commenting on this, one writer says: "There is apparently no other instance of the application of such a doctrine. But its justice and reasonableness are so manifest and it supplies such a simple and direct method of preventing the avoidance of liability by the subterfuge of creating 'dummy' corporations that the

present writer has no hesitation in expressing the hope that it will meet with general acceptance." C. B. Labatt, Esq., in note to *RICHMOND v. SITTERDING* (1903, Va.), in 65 L. R. A. 508. See, also, Sec. 167, *post*.

¹⁷⁸ *Moore v. Stainton* (1903), 80 App. Div. 295; 80 N. Y. Supp. 214; 177 N. Y. 581; 59 N. E. 1127; to the same effect, *Chicago, etc., Co. v. Campbell* (1904), 116 Ills. App. 322; *Cole v. Louisiana, etc., Co.* (1908), 121 La. 771; 46 So. 801.

Sec. 32. Burden of Proof, on Whom.

"The weight of authority is in favor of the doctrine that, when the inquiry is at that initial stage at which nothing more appears than that the actual tort-feasor was, at the time when the injury was inflicted, in the employment of him who is sought to be held, the latter, if he relies on that defence, has the burden of proving that the tort-feasor was an independent contractor."¹⁸² "Though such a doctrine has apparently not been explicitly formulated, it would seem at least to be a reasonable inference from the decisions, as a whole, that no presumption that the relation of the parties was that of master and servant can be entertained, when the case has been developed to a point at which the nature of the employment (whether general or with a view

it was held that the contract being such as to vest the occupancy and control of the ferry in H. as tenant rather than as servant, the defendant was not liable for his acts. *FELTON v. DEALL* (1850), 22 Vt. 170; 54 Amer. Dec. 61. In a Massachusetts case the somewhat analogous question whether a master rigger employed to do certain work on a building, who hired his own men and furnished his own tools and received a specified price per diem for the services of his men and the use of his tools, was an independent contractor or a servant, was not specifically determined, as the defendant was held not liable under either theory. *Harkins v. Standard, etc., Refinery* (1877), 122 Mass. 400.

¹⁸² Note to *RICHMOND v. SITTERDING* (1903, Va.), 65 L. R. A. 459, citing *Welfare v. London, etc.,*

Railroad (1869), L. R., 4 Q. B. 693. *Prima facie*, the person at whose instance and for whose use and benefit work is done is liable for all injuries to third persons resulting from the negligence or unskillfulness of those executing the work; that, unless some evidence is given as to the terms of the contract, "it is no more proper to assume that it gave the contractor an independent employment than that it stipulated for the work to be done under the immediate supervision and direction of the defendant;" if the defense is that the wrongdoer was not a servant the contract must be shown "with sufficient particularity to enable the court to determine whether the employment was of this independent character." *McCamus v. Citizens, etc., Co.* (1863), 40 Barb. (N. Y.), 380.

In a recent California case the facts presented were somewhat unusual. The defendant's farm superintendent, who was also a member of a hardware firm, directed an employee of the firm to go to the farm and repair a leak in a tank, a farm appliance. This was so negligently done that an explosion occurred and the plaintiff's intestate, the defendant's farm servant, was killed. The hardware firm was held to be an independent contractor, notwithstanding the connection of the defendant's superintendent therewith.^{180a} As shown by the citations below, the question is sometimes also presented whether the employer, whose wrongdoing servant caused the injury complained of, was an independent contractor or stood in some other relation.¹⁸¹

A person employed and paid by a contractor as driver of a horse and wagon which, together with the driver, the contractor lets by the day to a city to be used in the work of paving a street, and who has the entire management of the horse as to the manner of driving him and whose duty it is to see that he is properly shod, is the servant of the contractor in so driving the horse and having him shod, and from injury to a third person caused by his negligence in these respects, the contractor is liable. *HUFF V. FORD* (1878), 126 Mass. 24; 30 Amer. Rep. 645. Where in a given case a steam roller used in the improvement of a road was hired by the proprietor to the city charged with the reparation of the road, it was held that the engineer in charge of the machine remained the servant of the proprietor whose immediate employee he was,

so that it was responsible for his negligence in injuring a traveler on the highway. *STEWART V. CALIFORNIA IMPROVEMENT CO.* (1900), 131 Cal. 125; 63 Pac. 177, 724; Burd. Cas. Torts, 412; 52 L. R. A. 205.

^{180a} *HEDGE V. WILLIAMS* (1901), 131 Cal. 455; 63 Pac. 721; 64 Id. 106; 82 Amer. St. Rep. 366.

¹⁸¹ By statute, defendant was granted the right for a given time to maintain a certain ferry; he entered into a contract with one H. who was to keep and manage the ferry at his own expense for labor, repair expenses to be borne equally, and the receipts to be divided equally; H. further agreed to allow none but a competent man to attend the ferry and agreed to be answerable for damages due to negligent management; while H. was in charge under such contract, the boat upset and the plaintiff was injured;

Sec. 33. Obligation of Personal Performance as Test.

"If the terms of the contract are such as to indicate that the person employed may, if he so desires, perform the stipulated work by deputy, it will usually be inferred that he is not engaged as a servant. This rule is illustrated by the decisions, which exclude from the scope of statutes specifically applicable to masters and servants, all agreements under which the person employed is not obliged to perform the work himself."¹⁸⁶ A company which agrees to become the general constructor and repairer for another company and to assume all risks in reference thereto, is an independent contractor.¹⁸⁷

Sec. 34. Compensation as Test.

"While the manner in which payment is made is not a decisive test, yet it is undoubtedly an evidentiary fact to be taken into consideration for what it is worth in connection with the other circumstances to determine what the contract really was."¹⁸⁸ In an Indiana case it was held

¹⁸⁶ Note to *RICHMOND V. SITTERDING* (1903, Va.), in 65 L. R. A., p. 500, citing, *inter alia*, *Ex parte Rathbone* (1892), 13 New South Wales, L. R., 56; *McElroy v. Australian, etc., Co.* (1899), 24 Vict. L. Rep. 953; *Riley v. Warden* (1848), 2 Exch. 59; *Bowers v. Lovekin* (1856), 6 El. & Bl. 584; *Floyd v. Weaver* (1852), 21 L. T., Q. B. (N. S.), 151; *Sharman v. Sanders* (1853), 13 C. B. 166; *Labatt on Master & Serv.*, pp. 2063-2064. "On the other hand, as the principle of the maxim, *delegatus non potest delegare*, is understood to apply in its full force to a servant, it is perhaps

permissible to lay down the doctrine that, if it should appear, either from the nature of the employment or the terms of the agreement, that the person employed is expected to do the work with his own hands, the appropriate inference will usually be that he is engaged as a servant. But there is very little judicial authority on this specific point." (Same note, p. 501.)

¹⁸⁷ *Monroe v. Fred. T. Ley & Co.* (1907), 156 Fed. 468. Cf., note 132, Sec. 21, *ante*.

¹⁸⁸ *Thomps. Neg.*, Sec. 629, citing *Morgan v. Bowman* (1856), 22 Mo. 538.

to a specific result) the character of the work contracted for and the industrial status of the person engaged have been disclosed by the testimony.”¹⁸³ As between the regular employer and a temporary one, the burden seems to be on the latter of showing that the one who is rendering service to him is not his servant, but the servant of the former.¹⁸⁴ Some cases expressly hold that in some stages of the evidence the presumption that the relation of master and servant did not exist will prevail and thus inure to the defendant's advantage.¹⁸⁵

¹⁸³ Note to *RICHMOND v. SITTERDING* (1903, Va.), 65 L. R. A. 460.

¹⁸⁴ *Taylor, etc., Railroad v. Warren* (1895), 88 Tex. 642, 648; 31 S. W. 66; 32 S. W. 868.

¹⁸⁵ *Welfare v. London, etc., Railroad* (1869), L. R., 4 Q. B. 693; *Boniface v. Relyea* (1868), 6 Robt. 397; driver of a carriage at a funeral was negligent and it was held that evidence of the employer's right to control was necessary. In *EVANSVILLE v. SENHENN* (1897), 151 Ind. 42, 61; 47 N. E. 634; 51 Id. 88; 41 L. R. A. 728, 734; 68 Amer. St. Rep. 218, evidence that a city had a contract with the person who piled lumber on a street for the purchaser of such lumber is sufficient to authorize an instruction regarding the owner's liability to third persons for an independent contractor's negligence although the terms of the contract do not appear, since if there is anything in such contract tending to show the relation of master and servant between the city and such person, the one asserting such relation should offer evidence to approve it. An Illinois court held it was error to

permit a jury to assume that a man employed by defendant to take charge of a stable and train defendant's horses was necessarily a servant; in this case the trainer assaulted a man hired by him and the defendant was held not liable. *Arasmith v. Temple* (1882), 11 Ills. App. 39. In Alabama it is held that as the burden is on the plaintiff to prove that the relation of master and servant existed, no presumptions which do not arise from the evidence can be indulged in favor of plaintiff. *Harris v. McNamara* (1892), 97 Ala. 181; 12 So. 103. As to what constitutes *prima facie* case showing such relation, see *ROME, ETC., RAILROAD v. CHASTEEN* (1889), 88 Ala. 591; 7 So. 94; 40 Amer. & Eng. Railroad Cas. 559. To the contrary, the burden was held to be upon the employing railroad to show that injuries to property were done by an independent contractor for whose conduct it was not responsible, in *St. Louis, etc., R. v. Davenport* (1906), 80 Ark. 244; 96 S. W. 994; 48 Amer. & Eng. Ry. Cas. (N. S.), 516.

payment of an employee by the day, though an important consideration, is not *per se* decisive of the relation of master and servant. There are quite a few cases where one who was working by the day has been held an independent contractor.¹⁹⁴ For the fact that the contractor is paid by the day does not necessarily destroy the independent character of the employment.¹⁹⁵ In a leading case it was said that one employed to do a certain service under a contract providing that the owner should furnish the material and that the contractor should employ the labor and superintend the work according to certain plans and receive a *per diem* for himself and each of his employees was an independent contractor.¹⁹⁶ In another leading case the owners of a sugar refinery had employed a rigger to remove machinery from a railroad car to their refinery; but though they paid him by the day, they neither interfered with nor directed the

¹⁹⁴ CORBIN v. AMERICAN MILLS (1858), 27 Conn. 274; 71 Amer. Dec. 63, blasting rock by the day; SMITH v. SIMMONS (1883), 103 Pa. St. 32; 49 Amer. Rep. 113, contractor laying pipe by the day (doubtful, because the work was inherently dangerous at all events); MOORE v. SANBOURNE (1853), 2 Mich. 519; 59 Amer. Dec. 209; Pierrepont v. Loveless (1878), 72 N. Y. 211, driving logs at so much per log; Peachey v. Rowland (1853), 13 C. B. 182; Linton v. Smith (1857), 8 Gray (Mass.), 147, stevedores employed for a gross sum; WRIGHT v. HOLBROOK (1872), 52 N. H. 120; 13 Amer. Rep. 12, employe of municipality; and compare, Kellogg v. Payne (1866), 21 Iowa, 575; Wood v. Independent School District (1876), 44 Iowa, 27.

¹⁹⁵ HARRISON v. COLLINS (1878), 86 Pa. St. 153; 27 Amer. Rep. 699; Forsyth v. Hooper (1865), 11 Allen (Mass.), 419; CORBIN v. AMERICAN MILLS, *supra*.

¹⁹⁶ EMMERSON v. FAY (1896), 94 Va. 60; 26 S. E. 386. One contracting with a city to excavate a reservoir and do the preliminary work, using his own men, teams and material, and adopting his own method of doing the work, without interference, or the right to interfere on the city's part, is an independent contractor, for whose negligence the city is not responsible, although his compensation is fixed at a specified sum per day and expenses; Groesbeck v. Pinson (1899), 21 Tex. Civ. App. 44; 50 S. W. 620.

that the mode of payment for the work might be considered in determining whether one was an independent contractor, but that this test was not conclusive.¹⁸⁹ "But the mode of payment is not a decisive test by which to determine the question. The test lies in the question whether the contract reserves to the proprietor the power of control over the employee."¹⁹⁰ It is immaterial how the contractor is to be compensated, whether by a lump sum or a commission on the cost or a *per diem*.¹⁹¹ It was laid down in a Louisiana case that that State's code ordinarily infers the power of control and discharge from the payment of wages; and this was declared to be the common law rule as well, but this last is perhaps too broad.¹⁹²

Various methods of payment may be adopted, such as a *per diem* basis, a sum in gross, a percentage or a quasi-commission basis on the entire work, or so much *per quantum* of work, and the like. The effect of each of these several modes of compensation has been reviewed by the courts, but not uniformly with the same result.¹⁹³ The

¹⁸⁹ *Indiana, etc., Co. v. Gray* (1897), 19 Ind. App. 565; 48 N. E. 803; *Kueckel v. Ryder* (1900), 170 N. Y. 562. "Where * * * compensation is dependent on the value of the services."

¹⁹⁰ *Thomp. Neg.*, 629, citing *Morgan v. Smith* (1893), 159 Mass. 570; 35 N. E. 101; 15 Am. Neg. Cas. 667, n; *Harris v. McNamara* (1892), 97 Ala. 181; 12 So. 103; *WATERS v. PIONEER, ETC., Co.* (1892), 52 Minn. 474; 55 N. W. 52; 32 Amer. St. Rep. 564; *Geer v. Darrow* (1891), 61 Conn. 220; 23 Atl. 1087.

¹⁹¹ *Whitney, etc., Co. v. O'Rourke* (1898), 172 Ills. 177; 50 N. E. 242; *Grace, etc., Co. v.*

Probst (1904), 208 Ills. 147; 70 N. E. 12; *Morgan v. Smith, supra*; *Emmerson v. Fay* (1896), 94 Va. 60; 26 S. E. 386 (*per diem*).

¹⁹² *Shea v. Reems* (1884), 36 La. Ann. 966.

¹⁹³ "It is well settled, however, that these different methods of payment, although they are usually the concomitants of the relations thus specified, are not so closely and essentially connected therewith, that the character of the contract can be inferred as a matter of law from the adoption of one method or the other in the given instance." Note to *RICHMOND v. SITTING* (1903, Va.), in 65 L. R. A. 505.

men to assist who were under his control and were paid by him, did not tend to show that the employer was the master of the wrongdoer.²⁰¹ A corporation erecting a building for the owner, under a percentage contract, by which it is to furnish materials and labor and be paid its cost with a percentage added, is an independent contractor.²⁰²

A person employed by a railroad company to clear off and burn brush and rubbish from its right of way, at a certain sum per mile, who hired, paid and controlled his own help, was declared in a leading Arkansas case not to be a servant of the company, but an independent contractor.²⁰³ Where A. undertook to clear the land of B. at a stipulated sum per acre, and by the negligence of A. fire escaped to the land of C., it was held that B. was not liable to C.²⁰⁴

²⁰¹ *East St. Louis, v. Giblin* (1878), 3 Ills. App. 219. A person employed to take charge of a shingle mill, employ and pay all laborers, make all repairs, manufacture the shingles from lumber furnished by the owner, install at his own expense any new machinery to be furnished on his requisition by the owner, and to receive a stipulated sum for the product of the mill, is an independent contractor in the employ of the owner of the mill; *Ziebell v. Eclipse, etc., Co.* (1903), 33 Wash. 591; 74 Pac. 680.

²⁰² *Whitney, etc., Co. v. O'Rourke* (1898), 172 Ills. 177; 50 N. E. 242. A person employed by a sewing machine company, under a written contract to sell its wares and to be paid by commissions on sales and collections, the company to furnish a wagon and he furnishing horse and harness, to be

used exclusively in such business, he agreeing to give his whole time and best energy to the business, and to employ himself under the company's direction and under its rules and restrictions, is a servant of such company; *SINGER MANUFACTURING Co. v. RAHN* (1889), 132 U. S. 518; 33 Law ed., 440; 10 Sup. Ct. 175; *Huff. Cas. Agcy.* 9.

²⁰³ *ST. LOUIS, ETC., RAILROAD v. YONLEY* (1900), 53 Ark. 503; 13 S. W. 333; 14 S. W. 800; 45 A. & E. Railroad Cas. 518; 9 L. R. A. 604.

²⁰⁴ *FERGUSON v. HUBBELL* (1884), 97 N. Y. 507; 49 Amer. Rep. 544. One who undertakes to clear a tract of land at so much per acre or for the whole tract is considered an independent contractor; *Threlkeld v. White* (1890), 8 New Zeal. L. R. 513.

manner of the work; and it was held that the rigger was an independent contractor and not a servant.¹⁹⁷

There are several cases where the person working by the job and paid by the job has been held to be a servant.¹⁹⁸ Thus, it was held that a laborer engaged for 50 cents to drive an animal was a servant of the owner and not an independent contractor.¹⁹⁹ An employee has been held none the less a servant because he was to be paid by the piece or job and not by wages or salary.²⁰⁰ On the other hand, it was held that testimony that the wrongdoer was employed to do a certain work for \$10, that he employed

¹⁹⁷ *HARRISON v. COLLINS*, *supra*. The owner of a dredging machine is an independent contractor who is solely liable for injuries done by the negligence of its crew in performing work under a contract by which it is placed at the disposal of one who has undertaken the performance of a particular piece of work, the dredge to be paid for at a certain price per day, the contract to be terminated upon dissatisfaction of the one hiring it, and the crew to be efficient and diligent, where the entire supervision of the crew is under the control of the owner of the dredge, except as to the mere direction where service is to be performed. *Teller v. Bay*, etc., *Dredging Co.* (1907, Cal.), 90 Pac. 942; 12 L. R. A. (N. S.), 267; *Beatty*, Ch. J., dissenting with opinion.

¹⁹⁸ *BRACKETT v. LUBKE* (1862), 4 Allen (Mass.), 138; 81 Am. Dec. 694; *Sadler v. Henlock* (1855), 4 El. & Bl. 570; *DETROIT v. COREY* (1861), 9 Mich. 165; 80 Amer.

Dec. 78; *Darmstaetter v. Moynahan* (1873), 27 Mich. 188; *Burgess v. Gray* (1845), 1 Com. B. 578. "These last three cases are somewhat out of harmony with the current authority." *Thomps. Neg.*, Sec. 630, note 66.

¹⁹⁹ *O'Neill v. Blase* (1902), 94 Mo. App. 648; 68 S. W. 764, distinguishing *FINK v. MISSOURI, ETC., Co.* (1884), 82 Mo. 276; 52 Amer. Rep. 376; *Milligan v. Wedge* (1840), 12 Ad. & El. 737.
²⁰⁰ *St. Clair, etc., Co. v. Smith* (1890), 43 Ills. App. 105; *Whitson v. Ames* (1897), 68 Minn. 23; 70 N. W. 793; 2 Am. Neg. Rep. 178; (some evidence of exercise of control, hence properly for the jury); *RUMMELL v. DILWORTH, ETC., Co.* (1885), 111 Pa. 343; 2 Atl. 363; (1890), 131 Pa. 509; 19 Atl. 345; 17 Amer. St. Rep. 827; *HUFF v. WATKINS* (1880), 15 S. C. 85; 40 Amer. Rep. 680; *Richey v. DuPre* (1883), 20 S. C. 6; *Dagenois v. Houle* (1897), Quebec, U. C. S., 225.

mere fact that the wrongdoing representative carried on a separate and independent employment (such as domestic service) will not absolve the constituent.²⁰⁹ Merely because the work being done by an employee at the time he was injured was being done by the piece or job, does not deprive him of the character of employee, where he was a mere servant carrying out the employer's will and instructions.²¹⁰ "The ground upon which some decisions may be said to have proceeded was that, in view of the humble industrial status of the persons employed, and the simple character of the work to be done, the only admissible inference was that the employers intended to retain the right to give directions in regard to the details of the work. In other words, it was considered that, although the persons employed might be exercising an independent calling in the sense that they held themselves out as being prepared to do certain kinds of work for such parties as might engage them, the relation which they bore to those parties, during the progress of such work as might be undertaken by them, was in law that of a servant."²¹¹ It is held in Massachusetts that the em-

²⁰⁹ *BRACKETT v. LUBKE* (1862), 4 Allen (Mass.), 138; 81 Am. Dec. 694; *Sadler v. Henlock* (1855), 4 El. & Bl. 570.

²¹⁰ *Tennessee, etc. Co. v. Hayes* (1892), 97 Ala. 201; 12 So. 98; *Speed v. Atlantic, etc., Railroad* (1879), 71 Mo. 303; 2 Am. & Eng. R. Cas. 77; *contra*, *FINK v. MISSOURI, ETC., Co.* (1884), 82 Mo. 276; 52 Amer. Rep. 376, a remarkable case, characterized by Judge Thompson as "a brutal decision." *Thomp. Neg.* 629; note 59.

²¹¹ Note to *RICHMOND v. SITTERDING* (1903, Va.), in 65 L. R. A. 495. Thus, where a trap was

capsized by striking against a heap of stones which had been left beside the road by a man who had been employed to repair it, the defendant was held liable on the general ground that "if a person does merely menial work, then he is clearly a servant;" *Tucker v. Axbridge, etc., Board* (1889, Q. B. D.), 53 J. P. 87; *Cf.*, *Threlkeld v. White* (1890, C. A.), 8 New Zeal. L. R. 513; *Serandat v. Saisse* (1866), L. R. 1 P. C. 152; *McKeon v. Bolton* (1851), 1 Irish C. L. Rep. 377, where a man engaged to clean out defendant's ashpit at certain

On the other hand, the mere fact that a teamster was paid at a certain rate per foot for hauling lumber was considered insufficient to constitute the teamster an independent contractor.²⁰⁵

Merely because the employer pays the contractor's servants does not conclusively determine that he is to be regarded as their master;²⁰⁶ nor does the fact that a person alleged to be an independent contractor is employed at \$2 per day and hires other persons at the rate of \$1.50 per day take away the independent character of his employment.²⁰⁷ One who, having contracted to sink a shaft for the owner of a coal mine also undertakes, at the request of the company's superintendent, to unload certain boilers, using his own men in so doing and receiving no instructions as to the mode of doing the work, charging a lump sum for such services, is an independent contractor, even though no fixed price was agreed upon in advance.²⁰⁸

Sec. 35. Character of Work as Test.

The contract under which the work has been done must control, depending on surrounding circumstances; for the

²⁰⁵ *MacDonald v. O'Reilly* (1904), 45 Ore. 589; 78 Pac. 753. The mere fact that a coal miner is paid a certain amount for each ton of coal taken out by him does not constitute him an independent contractor, in such sense that he is exempt under the statute in controversy; *Oustrine, etc., Co. v. Gregory* (1903), 28 Vict. L. Rep. 586.

²⁰⁶ *Rourke v. White, etc., Co.* (1877), 1 C. P. Div. 556; 2 C. P. Div. 305.

²⁰⁷ *Karl v. Juniata Co.* (1903), 206 Pa. St. 633; 56 Atl. 78. No inference that one employed in unloading supplies for a company, hiring his own help, is an independent contractor, arises from the fact that his compensation is at a fixed amount per carload; *Foster v. National, etc., Co.* (1907), 216 Penn. 279; 65 Atl. 618.

²⁰⁸ *Galatia, etc., Co. v. Harris* (1904), 116 Ills. App. 70.

Sec. 36. Relation Determined by Statute.*(a)* Civil Statute.

An Arkansas statute which provides: "If any hiring shall wilfully set on fire any woods," etc., so as to occasion loss to another, with the employer's consent or demand, the employer shall be liable was held in a leading case to refer to servants but not to include independent contractors.²¹⁴ A contractor with the minister of railways and canals, as representing the Crown for constructing a branch railroad, is not an "employee" of the Canadian Railway, etc., Department within the 1881 Government Railway Act (44 Vict., Chap. 25) requiring action against any officer, employee or servant of the department for anything done by virtue of his employment to be brought within three months, etc.²¹⁵

(b) Criminal Statute.

A Maine statute makes the owners or lessees of a mill liable for the acts of "persons in their employ" in throwing

per yard, is an independent contractor, although the company furnished track, trestle, cars, mules and drivers; *Central Railroad v. Grant* (1872), 46 Ga. 417; 4 Am. Neg. Cas. 212, n. *Contra*, *Stone v. Codman* (1834), 15 Pick. (Mass.), 297, per Shaw, Ch. J., whose decision is criticised by Judge Thompson, in his *Commentaries on Negligence*, sec. 629, note 61.

²¹⁴ *ST. LOUIS, ETC., RAILROAD v. YONLEY* (1890), 53 Ark. 503; 13 S. W. 333; 14 S. W. 800; 9 L. R. A. 604; 45 Am. & Eng. Ry. Cas. 578.

²¹⁵ *Kearney v. Oakes* (1890),

18 Can. S. C. 148, Ritchie, Ch. J., and Gwynne, J., dissenting. Cf., *EATON v. EUROPEAN, ETC., RAILROAD* (1871), 59 Me. 520; 8 Amer. Rep. 430. A person who sells and delivers stone for the purpose of repairing a road is a contractor within the Upper Canada statute (16 Vict. Ch. 190), declaring "contractors" to be liable for leaving materials so as to obstruct a road; *Lennox v. Harrison* (1858), 7 U. C. C. P. 496. In Quebec and elsewhere by the code (sec. 1799, French Civ. C.), certain workmen who make contracts by the job for their own account, are deemed to be con-

ployer's intention to retain the right of exercising control and hence creating the relation of master and servant should always be inferred where it appears that the employment was general and not based on a contract to do a certain piece of work on certain specified terms in a particular manner and for a stipulated price.²¹² There is considerable authority against the doctrine that the relation of master and servant may be inferred where the employment was general, in so far as such doctrine is advanced as one, which irrespective of the nature of the stipulated work and the employee's industrial status, furnishes an adequate and decisive test of the character of the contract.²¹³

intervals once deposited them in the street temporarily and thereby caused injury to plaintiff, Blackburn, J., remarked that the nature of the employment made a difference, and that the wrongdoer was a mere servant, regard being had to the fact that it was on defendant's own premises and under his wife's directions.

²¹² BRACKETT v. LUBKE (1862), *supra*; Dane v. Cochrane, etc., Co. (1895), 164 Mass. 453; 41 N. E. 678. Cf., Regina v. Hughes (1846), 2 Cox C. C. 104, under a criminal statute; CITY OF TIFFIN v. McCORMACK (1878), 34 Ohio St. 638; 32 Amer. Rep. 408; Nyback v. Champagne, etc., Co. (1901), 48 C. C. A. 632; 109 Fed. 732; Perry v. Lord (1885), 17 Mo. App. 212.

²¹³ Welfare v. London, etc., Railroad (1869), L. R. 4 Q. B. 696; HEXAMER v. WEBB (1886), 101 N. Y. 377; 4 N. E. 755; 54 Amer. Rep. 703. See, also, Dutton v. Amesbury, etc., Bank (1902),

181 Mass. 154; 63 N. E. 405. The relation of independent contractor exists between the owner of lands and a person he employs to move a building in which service the contractor is to furnish the labor and appliances for a specified sum; Wilbur v. White (1903), 98 Me. 191; 56 Atl. 657; 16 Am. Neg. Rep. 606, n. In a case where one of two adjoining proprietors employed a man to repair a wall in his building nearest plaintiff's structure, and the man so employed dug up the ground in the passageway and left it so piled up that when a storm occurred the water was turned into plaintiff's cellar, it was held the relation of master and servant was not established between the employer and employee and his workmen, and hence defendant was not liable for the resulting injury; Dutton v. Amesbury, etc., Bank, *supra*. One who has engaged to do a piece of filling for a railroad company at so much

the ground that an information laid under a certain statute showed that the plaintiff and the defendant "stood in the situation of contracting parties" for doing certain work, it was held that a charge to the effect that the plaintiff had contracted with B. to do certain work, etc., and having done part of it refused to complete it, was insufficient to sustain conviction.²¹⁹

Sec. 37. Pleading the Relation.

In an able and exhaustive opinion, Judge Wiley of the Indiana Appellate Court stated: "As a matter of pleading we are inclined to the view that the . . . complaint does not show that N. was an independent contractor. The contract of employment as disclosed by the complaint, did not merely look to the result to be attained, but also to the means and method by which the work was to be done and which, according to the complaint, were to be determined by the appellant (employers). It very clearly appears that in using dynamite to accomplish the end, N. represented the will of the appellants, and therefore did not act independently and of his own volition, and in this respect he must be regarded as having acted strictly within the line of his employment and the duty he owed to appellants."²²⁰ An allegation that the wrong-doing person was working "under the superintendence, control, management and direction" of the defendant, will be construed as proceeding on the theory that such person is a servant, and if the testimony

²¹⁹ *Lancaster v. Greaves* (1829), 9 Barn. & C. 628. Cf., *Hardy v. Pyle* (1829), 4 Mann. & R. 295; *Regina v. Thomas* (1853), 6 Cox C. C. 403.

²²⁰ *Falender v. Blackwell* (1906), 39 Ind. App. 121, 126; 79 N. E. 393, citing *WABASH, ETC., RAIL-*

ROAD V. FARVER (1887), 111 Ind. 195; 64 Amer. Rep. 696; 12 N. E. 296; 31 Am. & Eng. Ry. Cas. 134; *POWELL V. CONSTRUCTION CO.* (1890), 88 Tenn. 692; 13 S. W. 691; 17 Am. St. Rep. 925; *Jensen v. Barbour* (1895), 15 Mont. 582; 39 Pac. 906.

refuse into the Penobscot River. A person who was operating a shingle machine to manufacture shingles by the thousand for such owners, etc., was declared not to be such "person in their employ" as to render them liable.²¹⁶ While there are but few American cases on this subject, the number of English and Canadian cases is quite large. A drover employed, in a single instance, to drive two cows to a purchaser was held to be a servant under a statute declaring embezzlement by "a servant or person employed in the capacity of a servant," to be a felony.²¹⁷ One who hires out to work with his own ox-team was held not to be within the English statutes, punishing deserting laborers.²¹⁸ On

tractors for the kind of work they undertake, and are subject to the rules prescribed with regard to that class of employes.

²¹⁶ *State v. Emmerson* (1881), 72 Me. 455. To the same effect, *State v. Coe* (1881), 72 Me. 456.

²¹⁷ *Rex v. Hughes* (1832), 1 Moody C. C. 370; see also, *Regina v. Goodbody* (1838), 8 Car. & P. 665. Where a man employed to drive pigs to a certain place appropriated the proceeds and absconded, he could not be convicted of larceny on the theory that he had possession of them as the prosecutor's servant, where the evidence was that, while he was paid the expenses of the cattle, and the customary mode of paying such employes was by the day, he was a drover and, according to the general usage regarding drovers, had the liberty to drive any one's cattle; *Regina v. Hey* (1849), 2 Car. & K. 985, criticising *Rex v. McNamee* (1832), 1 Moody C. C. 368. To

the same effect as *Regina v. Hey*, *supra*, see *Regina v. Siffidge* (1853), Legge, New South Wales 793. A porter who was occasionally employed by a butter factor to leave parcels at purchasers' houses and who was paid by those to whom he delivered, was held to be such factor's servant within the embezzlement statute, and not an independent contractor; *Regina v. Lynch* (1854), 6 Cox C. C. 445.

²¹⁸ *Whelen v. Stevens* (1827), 2 Taylor, Ont., 439. Fishermen who agree to fish from their homes in their own boats, for lobsters during the fishing season, are independent contractors and hence not within the Newfoundland "Master and Servant" act, chap. 109, and can not be prosecuted for abandoning their contract, by taking up their traps in the middle of the season and refusing to proceed; *Ex parte Costigan* (1884), Newf. Rep. 414.

without stipulation as to terms, price or time of doing it, has, however, been held a servant of the owner for whose negligence the owner is liable.²²⁴ A corporation contracting to place an elevator in running order in a building at a stipulated price, without direction or control of the owner of the building in doing the work, has been held an independent contractor in an Indiana case.²²⁵ Where a carpenter engaged in building a house on his own lot contracts with a firm of brickmasons to do all the brick work, such firm employing the necessary labor, the brickmasons are independent contractors.²²⁶ A master plumber employed to repair water pipes in a building, in his own way, is an independent contractor.²²⁷ One who undertakes to do brick and stone work on a building at an agreed price per cubic foot to be paid on estimates as the work progresses,

is an independent contractor for whose acts in roofing, to plaintiff's injury, the owner of the building is not liable; *McCARTHY v. PORTLAND, ETC.*, *PARRISH* (1871), 71 Me. 318; 36 Amer. Rep. 320.

²²⁴ *BRACKETT v. LUBKE* (1862), 4 Allen (Mass.), 138; 81 Amer. Dec. 694.

²²⁵ *Parkhurst v. Swift* (1903), 31 Ind. App. 521; 68 N. E. 620; 16 Am. Neg. R. 613, n. One employed to do work on a building under contract authorizing him to procure labor and material in his own way, provided it be such as the contract demands, and to use such machinery and appliances as he deems proper, if he does not injure the building or interfere with work done by others, is an independent contractor; *Hughbanks v. Boston, etc., Co.* (1894), 92 Iowa 267;

60 S. W. 640; 14 Am. Neg. Cas. 592, n.

²²⁶ *RICHMOND v. SITTERDING* (1903), 101 Va. 354; 43 S. E. 562; 99 Am. St. Rep. 879; 65 L. R. A. 445; 16 Am. Neg. R. 609, n. One under contract with the owner of premises to erect a wall thereon at a specified price per 1,000 brick, is not a servant of a corporation of which the owner is an officer, and which is in possession of the premises and also of the adjoining premises, so as to impose the duty of a master upon it in respect to protecting him from injury from its machinery; *HORTON v. VULCAN, ETC., Co.* (1897), 13 App. Div., 508; 43 N. Y. Supp. 669.

²²⁷ *BENNETT v. TRUEBODY* (1885), 66 Cal. 509; 6 Pac. 329; 56 Amer. Rep. 117; 16 Am. Neg. R. 612, n.

shows he was an independent contractor, there will be such variance as to preclude plaintiff's recovering.²²¹ On the other hand, it is said by at least one court that the intentment is that the plaintiff is seeking to recover on the ground of the existence of a contract of service, where he alleges in his declaration that the negligent person was "working under the direction" of the defendant.²²²

Sec. 38. Particular Instances of Independent Contractor.

Without attempting to exhaust the list of employments, which have been passed upon and determined to be independent or merely those of service, a number of specific instances will be enumerated. Many others will be observed in passing, in other portions of this work. It will be noted that by far the greatest number refers to those engaged in constructing and repairing buildings, railroads, public improvements and such enterprises, and in employments more or less closely allied to these undertakings. But at the same time, other callings (commercial and professional) have been before the courts and instances of these latter cases will be cited.

(a) Building Constructors.

A mason, a carpenter, or other mechanic, whose business is recognized as a distinct trade, renders services to his employer, ordinarily, as an independent contractor and not as a servant.²²³ A carpenter employed to repair a house,

²²¹ *Hunt v. Vanderbilt* (1894), 115 N. C. 559; 20 S. E. 168.

²²² *MANN V. O'SULLIVAN* (1899), 126 Cal. 61; 58 Pac. 375; 77 Amer. St. Rep. 149. As to allegations in criminal complaints see, *supra*, Sec. 36b.

²²³ *Lawrence v. Shipman* (1873), 39 Conn. 586; so also, a con-

tractor employed to erect a building, *Hilliard v. Richardson* (1855), 3 Gray (Mass.), 349. Persons employed in the construction of a church are not servants of a building committee who look after the work, *Wilson v. Clark* (1892), 110 N. C. 364; 14 S. E. 962. Person in business as roof-slater

the control of the contractor.²³¹ Where a person contracted with a railroad company to complete an abandoned construction job, at a certain price, this was held not to make him the company's servant for whose trespass in taking timber from another's land the company would be liable.²³² One who undertakes to grade and repair a part of the roadbed for a railroad track, the railroad company having no control of the means by which the work is to be accomplished and having only a right of general supervision and inspection to see that the contract is properly performed is an independent contractor.²³³

(c) Architects.

An architect who merely prepares the plans and specifications and does not thereafter supervise the execution of the work on his employer's behalf is an independent contractor;²³⁴ and especially where he undertakes to execute the entire work in addition to preparing the plans.²³⁵ It is said, however, that as building operations are ordinarily conducted, the architect acts as the agent of the one for whom the work is being done.²³⁶ A recent New York case holds that an architect employed by

²³¹ MILLER v. MINNESOTA, ETC., RAILROAD (1888), 76 Iowa 655; 39 N. W. 188; 14 Amer. Dec. 258; 38 Am. & Eng. R. Cas. 234.

²³² New Orleans, etc., Railroad v. Reese (1884), 61 Miss. 581; 18 Am. & Eng. R. Cas. 110.

²³³ BOYD v. CHICAGO, ETC., CO. (1905), 217 Ills. 332; 75 N. E. 496; 108 Amer. St. Rep. 253; 43 Amer. & Eng. R. Cas. (N. S.), 154; Cf., Louisville, etc., R. v. Cheatham

(1902), 118 Tenn. 160; 100 S. W. 902.

²³⁴ Pitcher v. Lennon (1896), 12 App. Div. 356; 42 N. Y. Supp. 156; Burke v. Ireland (1901), 166 N. Y. 305; 59 N. E. 914.

²³⁵ BOSWELL v. LAIRD (1857), 8 Cal. 469; 68 Amer. Dec. 345.

²³⁶ Campbell v. Lunsford (1887), 83 Ala. 512; 3 So. 522; SCHWARTZ v. GILMORE (1867), 45 Ills. 455; 92 Amer. Dec. 227.

the owner furnishing all the material, but having nothing to do with the work except to see that it is completed in accordance with the plans and specifications, having no control over the workmen employed, is an independent contractor.²²⁸

(b) Railroad Constructors.

Contractors employed by a railroad company to build a road, or to grade it, have been held independent contractors in a number of cases.²²⁹ Where a railroad company employed a man to furnish and superintend a portable engine to pump water out of the way, so as to admit of prosecuting the work, neither the company nor its employees having the right to interfere in the manner of running the engine or in giving directions to its owner, the latter is an independent contractor.²³⁰ It has been held that even where the railroad company furnishes the motive power and operates the construction train by its own engineer, it will not be liable for damages created in operating it where the engineer is under

²²⁸ *Chute v. Moeser* (1907), 77 Kans. 706; 95 Pac. 398. Cf., *Scharff v. Southern Illinois, etc., Co.* (1905), 115 Mo. App. 157; 92 S. W. 126; *Veitch v. Jenkins* (1907), 107 Va. 68; 57 S. E. 574. Evidence was held insufficient to show that a master steam fitter in repairing a building was an independent contractor, in *Meyers v. Syndicate, etc., Co.* (1907), 47 Wash. 48; 91 Pac. 549. Painters and decorators have been held to be independent contractors; *Metzinger v. New Orleans Board, etc.* (1907), 120 La. 124; 44 So. 1007; *Finkelstein v. Balkin* (1907), 103

N. Y. Supp. 99. Likewise persons operating mills, factories, etc.; *Kirby v. Lackawanna, etc., Co.* (1905), 109 App. Div. 334; 95 N. Y. Supp. 833; *Giacomini v. Pacific, etc., Co.* (1907), 5 Cal. App. 218; 89 Pac. 1059; *BARCLAY v. PUGET SOUND, etc., Co.* (1908), 48 Wash. 241; 93 Pac. 430; 16 L. R. A. (N. S.), 140.

²²⁹ *LOUISVILLE, etc., RAILROAD v. CONROY* (1896), 63 Miss. 562; 56 Amer. Rep. 810.

²³⁰ *WABASH, etc., RAILROAD v. FARVER* (1887), 111 Ind. 195; 12 N. E. 296; 60 Amer. Rep. 696; 3 Am. & Eng. R. Cas. 134.

work for others. "If the facts were as testified to by B. and defendant's manager, B. was not defendant's servant but was an independent contractor for whose negligence defendant was not responsible."²⁴²

(e) Liveryman.

Livery-stable proprietors render services to their employers, ordinarily, as independent contractors and not as servants.²⁴³ A Federal case holds that the driver of a licensed cab in New York city is the servant of the owner, towards the public, although a bailee of the horse and vehicle.²⁴⁴ The relation of master and servant is not created by an agreement between the owner of cabs and horses whereby they are let to drivers for a specified rental,

²⁴² *BURNS v. MICHIGAN PAINT Co.* (1908), 152 Mich. 613; 116 N. W. 182. In a note to this case in 16 L. R. A. (N. S.), 816, "Cartmen as Independent Contractors," it is said: "The cases generally hold that draymen, truckmen, cartmen, etc., are regarded as independent contractors unless there is specified evidence that control was exercised over them by the owner of the goods being hauled. The later cases . . . generally turn on the question whether the owner of the goods exercised or did not exercise control over the work during the process of the hauling;" citing *Drennon v. Patton, Worsham, etc., Co.* (1908, Tex. Civ. App.), 109 S. W. 218; *Chicago, etc., Co. v. Campbell* (1904), 116 Ills. App. 322; *Loughrain v. Autophone Co.* (1902), 77 N. Y.

App. Div. 542; 78 N. Y. Supp. 919; *Baldwin v. Abraham* (1901), 67 N. Y. Supp. 1079; 171 N. Y. 677; 64 N. E. 1118.

²⁴³ *Quarman v. Burnett* (1840), 6 Mees. & W. 499; 4 Am. Neg. R. 437, n.; *Jones v. Corporation* (1885), 14 Q. B. D. 890; *Joslin v. Grand Rapids Ice Co.* (1883), 50 Mich. 516; 45 Amer. Rep. 54; *Driscoll v. Towle* (1902), 181 Mass. 416; 63 N. E. 922; *Little v. Hackett* (1885), 116 U. S. 366; 6 Sup. Ct. 391; 23 Law ed. 655.

²⁴⁴ *Cargill v. Duffy* (1903), 123 Fed. 721. Compulsory servants as independent contractors: *Licensed public carmen, McMullen v. Hoyt* (1876), 2 Daly, N. Y. 271; *licensed drovers, Milligan v. Wedge* (1840), 12 Ad. & El. 737; but *contra*, in principle, *Martin v. Temperly* (1843), 4 Q. B. 295. See *ante*, Sec. 8.

the owner, in the matter of inspection, is to be regarded as an independent contractor.²³⁷

(d) Truckmen.

On the same principle (non-direction, non-interference, etc.), it has been held that one who employs a public, licensed draymen to haul a lot of barrels of goods is not liable for injuries inflicted by the latter by rolling a barrel against a person.²³⁸ A leading New York case asserts that a truckman renders services to his employer, ordinarily, as an independent contractor and not as a servant.²³⁹ An expressman contracting to haul goods for a house at a certain price per week is an independent contractor.²⁴⁰ One who does teaming work for a person, who merely directs him what to haul and where to, and who leaves all details of the work to the employee is a contractor and not a servant.²⁴¹ While plaintiff was walking on a city street, she was run into by an express wagon driven by B., a licensed expressman, owning the horse and wagon. He was delivering goods for the defendant. His wagon had attached to it a sign whose name designated defendant's shop. The arrangement between them was that B. was to deliver defendant's goods at \$15 a week, furnishing horse and wagon, doing the work himself or by his employees as he chose, determining his own route, being free to and doing similar

²³⁷ *Burke v. Ireland, supra.*

²³⁸ *DeForest v. Wright* (1852), 2 Mich. 368, cited in *Tiffany on Dom. Rels.* 510. See also, *Dalton v. Bachelor* (1851), 1 Fost. & F. 15. For a case involving an unlicensed teamster as an independent contractor, see *Wadsworth, etc., Co. v. Foster* (1893), 50

Ills. App. 513; (1897), 168 *Ills.* 514; 48 N. E. 163.

²³⁹ *MURRAY v. DWIGHT* (1900), 161 N. Y. 301; 55 N. E. 901; 48 L. R. A. 673.

²⁴⁰ *Foster v. Wadsworth, etc., Co.* (1897), 168 *Ills.* 514; 48 N. E. 163.

²⁴¹ *McCarty v. Muir* (1893), 50 *Ills. App.* 510.

railroad company hauling the car, as respects passengers on the train.²⁵⁰ But he is not a servant of the railroad company in the sense that makes him a co-servant of the regular train employees.²⁵¹

A lessee or licensee of the exclusive privilege of entering railroad cars or upon the right of way to sell or supply lunches, is not the railroad company's agent or servant so as to render it liable for an assault and battery on such lessee's competitor lawfully seeking patronage on his own premises, of passengers.²⁵² Where a foot passenger fell through a railroad bridge, which the public were permitted to use upon a track which a licensee company had built to connect its own system with that of the defendant, the latter was held not liable.²⁵³ One railroad company owning a road which is under the exclusive control and management of another company has been held in a Kentucky case not to be liable for personal injuries occasioned by the negligence of the latter's employees.²⁵⁴ A mine owner furnished a spur track connecting with an adjacent railway track to haul coal from its mine, and the railway company in hauling such coal used its own cars and operated them by its own servants in a negligent manner. The railway company was held to be an independent contractor, and stood in the relation of carrier towards its shipper.²⁵⁵

A street railroad company may be employed as an independent contractor by another street railroad company to clear and repair its cars and it, and not defendant company,

²⁵⁰ *Railroad Co. v. Ray* (1898), 101 Tenn. 1; 46 S. W. 554. See *post*, Secs. 133, 135.

²⁵¹ *Hughson v. Railroad Co.* (1893), 2 App. D. C. 98.

²⁵² *FLUKER v. GEORGIA RAILROAD* (1889), 81 Ga. 461; 2 L. R. A. 42; 9 S. E. 529; 12 Amer. St. Rep. 328.

²⁵³ *Gwathney v. Little Miami Railroad* (1861), 12 Ohio St. 92.

²⁵⁴ *Harper v. Newport, etc., Railroad* (1890), 12 Ky. Law Rep. 333; 14 S. W. 346.

²⁵⁵ *Coal Run Coal Co. v. Strawn* (1884), 15 Ills. App. 347.

such drivers agreeing not to use the horses for more than a certain number of hours, to wear a particular uniform, to abstain from liquor, conform strictly to prescribed rates and other regulations, the agreement being subject to cancellation on violation of any such condition, there being no limitation on the driver's discretion as to the manner in which he shall use the property and the fares earned belonging to him. ²⁴⁵

(f) Loggers.

One cutting logs for another under special contract and using the latter's dam, and injuring a riparian owner, is an independent contractor. ²⁴⁶ The defendants' agent purchased a raft with money furnished by them for that purpose. For purchasing and transporting the raft to defendants' depot he received a commission. The defendant company was held liable for negligence in sinking a flat-boat in navigating the raft. ²⁴⁷

(g) Railroad Companies.

A leading case holds that a bailor is not liable for the torts of a bailee or the bailee's servants. ²⁴⁸ A transfer company's agent, permitted by a railway company to check baggage on its trains, is not an employee of the railway company. ²⁴⁹ A Pullman car porter is a servant of the

²⁴⁵ Connor v. Pennsylvania R. (1904), 24 Pa. Super. Ct. 241.

²⁴⁶ CARTER v. BERLIN MILLS (1876), 58 N. H. 52; 42 Amer. Rep. 572.

²⁴⁷ Taylor v. Mexican, etc., Railroad (1847), 2 La. Ann. 654. Timber haulers, etc., as independent contractors, see cases cited in

note to 65 L. R. A. 469.

²⁴⁸ NEW YORK, ETC., RAILROAD v. NEW JERSEY, ETC., RAILROAD (1897), 60 N. J. L. 338; 61 Id. 287; 38 Atl. 828; 41 Id. 1116; 43 L. R. A. 849, 854.

²⁴⁹ Mefford v. Louisville, etc., Railroad (1892), 14 Ky. Law Rep. 327; 20 S. W. 263.

the ship owner's control is an independent contractor.²⁶¹ "A stevedore furnishing his own appliances and his own servants is in respect of the owner or charterer of the vessel, an independent contractor and not a servant; and clearly the owner or charterer is not liable for the negligence of the stevedore or his servants, in the absence of special circumstances changing the rule."²⁶² A stevedore engaged in unloading a vessel is held in Massachusetts, as a matter of law, an independent contractor.²⁶³ A firm undertaking to make repairs on a vessel, having entire control of the work and the persons engaged thereon, is an independent contractor.²⁶⁴

(i) Traveling Agents.

If the control which is generally considered the decisive mark of the relationship of master and servant, was as a matter of fact, exercised over a commercial traveler (which fact is primarily for the jury) such traveler, though paid by commission, is, in England, a "servant" only within the meaning of her embezzlement statutes.²⁶⁵

²⁶¹ *RANKIN v. MERCHANTS, ETC.*, Co. (1884), 73 Ga. 229; 54 Amer. Rep. 874; 14 Am. Neg. Cas. 75; *Sweeny v. Murphy* (1880), 32 La. Ann. 628.

²⁶² *Thomps. Neg.*, Sec. 635, citing *Daley v. Boston, etc., Railroad* (1888), 147 Mass. 101; 16 N. E. 690; *Pregenzer v. Burleigh* (1893), 26 N. Y. Supp. 35. For ferryman as independent contractors, see *Bowyer v. Anderson* (1831), 2 Leigh, 550; *Norton v. Wiswall* (1858), 26 Barb. 618, cited in *CRUSSELLE v. PUGH* (1881), 67 Ga. 430; 44 Amer. Rep. 724; *FELTON v. DEALL* (1850), 22 Vt. 170; 54

Amer. Dec. 61. Licensed pilots as independent contractors, see *The Maria*, 1 W. Rob. 95, 106, by statute; cf., *Martin v. Temperly* (1843), 4 Q. B. 295. See *ante*, Sec. 8.

²⁶³ *Sullivan v. New Bedford, etc., Co.* (1906), 190 Mass. 288; 76 N. E. 1048.

²⁶⁴ *Nelson v. Richardson* (1903), 108 Ills. App. 121.

²⁶⁵ *Regina v. Tite* (1861), 8 Cox C. C. 458; *Rex v. Carr* (1811), Russ. & R. C. C. 198; *Regina v. May* (1861), Leigh & C., C. C. 13; *Regina v. Bailey* (1871), 12 Cox C. C. 56.

was held liable to a passenger on one of defendant's cars for the negligence of the servant of the traction company. ²⁵⁶

(h) Vessels, etc.

One chartering a ship and furnishing a crew assuming control by contract, is an independent contractor as to the owner, and not an agent or servant. ²⁵⁷ If a charterer of a boat employs a towing company to tow it, the latter is an independent contractor as to the former, for the negligence of whose servants the former is not liable. ²⁵⁸ In England the courts hold that "the tug is in the service of the tow, and the tow is answerable for the negligence of her servant." ²⁵⁹ In America the owner of a tug is regarded as being, under ordinary circumstances, an independent contractor whose negligence is not imputable to the owner of the tow. ²⁶⁰ A stevedore loading a ship and not subject to

²⁵⁶ *Beckman v. Meadville, etc.*, R. (1907), 219 Pa. 26; 67 Atl. 983; 51 Amer. & Eng. R. Cas. (N. S.), 224.

²⁵⁷ *McDowell v. Homer Ramsdell, etc., Co.* (1894), 78 Hun (N. Y.), 228; 28 N. Y. Supp. 821.

²⁵⁸ *McLaughlin v. New York, etc., Co.* (1894), 7 Misc. (N. Y.), 119; 27 N. Y. Supp. 248. Cf., generally, *Tanco v. Booth* (1891), 15 N. Y. Supp. 110.

²⁵⁹ *Union S. S. Co. v. The Aracan* (1874), L. R. 6 P. C. 127. Cf., *The Niobe* (1888), L. R. 13 Prob. Div. 155, rejecting a contention that the tug owner was an independent contractor [counsel citing *Quarman v. Burnett* (1840), 6 Mees. & W. 499], and citing *Spraight v. Tedcastle*

(1881), L. R. 6 App. C. 217; *The American* (1874), L. R. 6 P. C. 127. See also, *The Stormcock* (1885), 5 Asp. Mar. L. Cas. 470; 53 L. T. (N. S.), 53; *The Cleadon* (1860), 14 Moore P. C. C. 97; *The Mary* (1879), L. R. 5 Prob. Div. 14; *The Sinquasi* (1879), L. R. 5 Prob. Div. 241.

²⁶⁰ *SPROUL v. HEMMINGWAY* (1833), 14 Pick. (Mass.), 1; 25 Amer. Dec. 350; *McLaughlin v. New York, etc., Co.* (1894), 7 Misc. 119; 27 N. Y. Supp. 248; *Sturgis v. Boyer* (1860), 24 How. 110; *Mabey v. Cooper*, *The* (1871), 14 Wall. 204; *The Belknap* (1873), 2 Low. Dec. 281; Fed. Cas. 1244. *Contra*, *Smith v. Creole* (1853), 2 Wall. Jr., 485; Fed. Cas. 13033, overruled by later cases, *supra*.

tractor;²⁶⁸ so also one whose services are supplied by a common carrier to a passenger.²⁶⁹ In a leading case in New Jersey a physician, whose services are supplied to the patients of another physician, is held to be an independent contractor.²⁷⁰ In another and later leading case a physician who was sent by a person who, in turn, had injured the plaintiff, for the purpose of examining the plaintiff, was considered an independent contractor.²⁷¹

Ordinarily a trained nurse performing her usual duties with the skill which is the result of training in that profession does not come within the definition of a servant, but rather is one who renders a personal service to an employer in pursuit of an independent calling and, therefore, any liability on her employer's part for her misconduct, resulting in a scandal causing loss of patronage of plaintiff's hotel, can not rest on a master's responsibility for a servant's acts.²⁷²

(I) Miners and Manufacturers.

A master ore digger who employs and pays his own assistants, to whose exclusive control and management are committed the work of mining ore, under a contract with the mine-owner, and who is paid by the owner so much per car for ore mined, is not a servant of the owner, although the latter has a right, under a custom, to object to miners

²⁶⁸ *York v. Chicago, etc., Railroad* (1896), 98 Iowa 544; 67 N. W. 574.

²⁶⁹ *O'BRIEN v. CUNARD S. S. CO.* (1891), 154 Mass. 272; 28 N. E. 266; 13 L. R. A. 329; *ALLAN v. STATE STEAMSHIP CO.* (1892), 132 N. Y. 91; 30 N. E. 482; 15 L. R. A. 166; 28 Amer. St. Rep. 556.

²⁷⁰ *MYERS v. HOLBORN* (1895), 58 N. J. L. 193; 33 Atl. 389; 30 L. R. A. 345; 55 Amer. St. Rep. 606.

²⁷¹ *PEARL v. WEST END RAILWAY* (1900), 176 Mass. 177; 57 N. E. 339; 49 L. R. A. 826; 79 Amer. St. Rep. 309; *Burd. Cas. Torts*, 407.

²⁷² *Parker v. Seasongood* (1907), 152 Fed. 583.

(j) Dealers and Merchants.

Where the plaintiff contracted to conduct a department in defendant's store it did not create the relation of employer and employee so as to render the former's absence, without the latter's consent, a breach, where the contract treats the plaintiff as the principal of the department, makes him the responsible purchaser of the merchandise purchased for it, leaving the defendant merely a guarantor, charges him with store rent and office expenses and with one-half of all losses arising from bad debts, reserves to the defendant, as profits, merely a commission on the net sales, and interest upon the goods purchased for the department, and requires him to render accounts to the plaintiff.²⁶⁶

(k) Physicians.

"There is no more distinct calling than that of the doctor and none in which the employee is more distinctly free from the control of his employer."²⁶⁷ In this case an employee was injured in a street car accident, and the company sent a physician to examine him, and this physician directed the injured person, who claimed he could not stand on his left leg, to try to stand on it, and in an effort to do so the plaintiff fell and sustained other injuries; and the court held that the company was not liable for the latter injury as the physician, in making the examination, was an independent contractor and free from the control or direction of the company employing him. A physician whose services are supplied by a common carrier to an employee is an independent con-

²⁶⁶ Lord v. Spielman (1898), 29 App. Div. 292; 51 N. Y. Supp. 534.

²⁶⁷ Holmes, Ch. J., in PEARL v.

WEST END RAILWAY (1900), 176 Mass. 177; 57 N. E. 339; 49 L. R. A. 826; 79 Amer. St. Rep. 309; Burd. Cas. Torts, 407.

franchise, but can only act through its governing body, the board of trustees.²⁷⁶ An Indiana case holds that a municipality is not relieved from liability by the fact that its electric light plant is under the control of a commission appointed by the city council. In the management and control of the enterprise the commission acts in behalf of, and represents, the municipality and the latter is liable for the negligent acts of the commission.²⁷⁷

Sec. 39. Effect of Death as Test.

The prevailing opinion in a New York case holds that a mere contract to do certain work in repairing a house for a stipulated price does not create the relation of master and servant so as to relieve the personal representatives of the one for whom the work was done, from liability for work performed after his death, even though the house is specifically devised and the personal representatives have no interest therein.²⁷⁸ "Inasmuch as agency is ordinarily a

²⁷⁶ *DAVOUST v. CITY, ETC.*, (1906), 149 Cal. 69; 84 Pac. 760; 9 Am. & Eng. Ann. Cas. 847.

²⁷⁷ *Richmond v. Lincoln* (1906), 167 Ind. 468; 79 N. E. 445. Where the statute empowering a city to operate an electric light plant also creates a commission to control it and names the members of the commission, this is not enough in itself to create the commission a corporation separate from the municipality, and the members of the commission are still servants of the city and may make it liable for their acts of negligence. *Fisher v. New Berne* (1906), 140 N. Car. 506; 53 S. E. 342. By an English statute, harbor commissioners were empowered to build or provide steam

tugs for towing vessels into and out of the harbor, for compensation agreed upon; plaintiff's vessel was damaged through the negligence and unskillfulness of a tug's master and crew, while being towed into the harbor; for their negligence the commissioners were held not liable. *Cuthbertson v. Parsons* (1852), 12 C. B. 304.

²⁷⁸ *Russell v. Buckhout* (1895), 87 Hun. 46; 34 N. Y. Supp. 271; Dykman, J., dissenting on the ground that a contractee's death dissolved the contract, and that the administratrix was liable only for the amount due at decedent's death. Cf., *LACY v. GETMAN* (1890), 119 N. Y. 112; 23 N. E. 452; 6 L. R. A. 728; 16 Amer. St. Rep. 806.

whom the master ore digger assumes to employ.²⁷³ In one case the plaintiff's barn was destroyed by fire from a mill which, while in a contractor's possession, caught fire from a furnace of the steam engine; the court held that, if the engine and mill were not in fact a nuisance when delivered by the defendant to be used in performing the contract, and if the plaintiff's injury was caused by the contractor's negligence in not keeping them in proper repair, the defendant was not liable.²⁷⁴ One selling machinery which was not to become the buyer's property until finally accepted as satisfactory in compliance with the contract, is in installing and testing it in an independent contractor, although the power used on the trial is furnished by the buyer.²⁷⁵

(m) Public Authorities.

When a city is liable by reasons of its proprietary and private capacity as distinguished from its governmental character, it can not escape liability for personal injuries caused by the negligent operation of its electric light plant on the ground that the grant of authority to maintain the plant is given to "the board of trustees of" such city and not in terms to the city; as a city being a mere intangible thing, existing only in legal contemplation, can not itself use the

²⁷³ *Harris v. McNamara* (1892), 97 Ala. 181; 12 So. 103. In another case certain lessees had contracted with X. to work the shale for them at a given price per ton. X. was to supply necessary furnishings, maintain machinery, pay employees' wages, and be liable for all accidents; he was to satisfy himself before beginning work that the shaft, etc., were safe, and neither he nor the lessee were to interfere with the other's

workmen. Held: X. was a separate contractor and that the lessees were not liable for injuries sustained in his service by his employees. *Grant v. Shaw* (1872), 9 Scot. L. R. 254. Other cases cited in 65 L. R. A. 467.

²⁷⁴ *BURBANK V. BETHEL, ETC., CO.* (1883), 75 Me. 373; 46 Amer. Rep. 400.

²⁷⁵ *Brown v. Rockwell, etc., Co.* (1906), 132 Iowa 631; 110 N. W. 12. See *ante*, n. 3.

CHAPTER II.

GENERAL RULE OF EMPLOYER'S LIABILITY.

SECTION

- 45. General rule stated.
- 46. Basis of non-liability.
- 47. Early rule stated.
- 48. *BUSH v. STEINMAN*.
- 49. Basis of early rule discussed.
- 50. Distinction as to real and personal property.
- 51. Present rule and tendency.
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SECTION

- 53. General rule as to liability of municipalities.
- 54. Same—As to school districts.
- 55. Same—As to railroad companies.
- 56. Same—As to other undertakings.
- 57. Same—As to subcontractors.
- 58. General rule after acceptance.

Sec. 45. General Rule Stated.

In the case of a servant the employer is legally responsible for the acts of the employee done in the course of the business; in the case of an independent contractor he is not generally responsible for such acts. Subject to certain exceptions enumerated hereafter, one who lets a contract for work and retains no control over the work, or the methods of doing it, is not liable for the negligence or other wrong of the contractor.¹ It is the well settled general rule, both in this country and in England, that a person who

¹ Huff, Agcy., Sec. 218, citing *Lawrence v. Shipman* (1873), 39 Conn. 586; *Blake v. Ferris* (1851), 5 N. Y. 48; 55 Amer. Dec. 304; *HEXAMER v. WEBB* (1896), 101 N. Y. 377; 4 N. E. 755; 54 Amer. Rep. 703; *Chase Cas. Torts*, 240; *ATLANTA, ETC., RAILROAD v. KIMBERLY* (1893), 87 Ga. 161; 13 S. E. 277; 27 Amer. St. Rep. 231; *Foster v. Wadsworth*, *Howland Co.*

(1897), 168 Ills. 514; 48 N. E. 163; *SINGER MANUFACTURING Co. v. RAHN* (1889), 132 U. S. 518; Huff. Cas. Agcy. 9; *Halliday v. National Telephone Co.* (1891), 1 Q. B. 221. See *Sadler v. Henlock* (1855), 4 E. & B. 570; *Brackett v. Lubke* (1862), 4 Allen (Mass.), 138; 81 Amer. Dec. 694, "for cases open to doubt."

relation and not a contract, the death of either party terminates the relation and all rights incident to it except so far as the agency has already been executed. Even where the agency is made irrevocable during life by clothing it in the form of a perfect contract, it will ordinarily be taken as an implied term in the contract that it is to terminate on the death of either party. Apparently the application of the maxim that the acts of the servant are the acts of the master would also result in the same conclusion; for how can an act be attributed to a dead man?" ²⁷⁹

²⁷⁹ 2 Street's Legal Liab., 491.

the owner employs a careful, skillful and competent builder or contractor to erect his building, and surrenders the possession of the premises for that purpose, then in such case the owner is not liable for an injury occurring to a stranger by the negligence or default of the contractor or his immediate servants or employees engaged in doing the work.”⁴ A leading authority declares that “in general, it is entirely competent for one having any particular work to be performed, to enter into an agreement with an independent contractor to take charge of and do the whole work, employing his own assistants, and being responsible only for the completion of the work as agreed. In such case, as a general rule, the contractor, for the time being, becomes an independent principal, whose servants are exclusively his, and not those of the employer he contracts with; and the contractor is in no such sense the servant of his employer as to give to others rights against the employer growing out of the negligence of the contractor or of his servants.”⁵

Sec. 46. Basis of Non-liability.

“The modern decisions have placed two limitations upon the liability of the master which deserve notice. The fellow servant doctrine relieves the master from liability where the person injured is a fellow servant of the tort-feasor. . . . The other limitation on the master’s liability is found in

⁴ *RICHMOND V. SITTERDING* (1903), 101 Va. 354; 43 S. E. 562; 99 Amer. St. 879; 16 Am. Neg. Rep. 609, n.; 65 L. R. A. 445, citing cases. See also cases cited in 1 L. R. A. (N. S.), 285, and see Subd. vii, c, in note to *Salliotte v. King Bridge Co.*, *supra*, at p. 620.

⁵ Cooley on Torts, Students’ Ed., Sec. 260, citing numerous cases, *q. v.* The appellant’s brief in *Cam-*

eron, etc., Co. v. Anderson (1904, Tex.), reported in 1 L. R. A. (N. S.), 198 (reported also in 16 Am. Neg. R. 599, 608), cites cases to the effect that defendant company was not liable for the acts of its independent contractor, including *Taylor v. Dunn* (1891), 80 Tex. 652; 16 S. W. 732; *Clapp v. Kemp* (1877), 122 Mass. 481.

employs an independent contractor to do work for him is not liable for the wrongful acts or neglect of the contractor or his servants in the performance of the work, where the work to be done under the contract is lawful.² "The modern doctrine seems to be that, if one engages with a contractor to do an act which may be done in a lawful manner, and the contractor in doing it *unnecessarily* commits a nuisance, whereby injury results to a third person, the employer will not be liable."³ "The general rule is that where

²Tiff. Dom. Rels., 509, citing REEDIE v. RAILWAY Co. (1849), 4 Exch. 244; 6 Eng. R. & Corp. Cas. 184; 4 Am. Neg. R. 438, n.; 9 Id. 122, n.; HARRISON v. COLLINS (1878), 86 Pa. St. 153; 27 Amer. Rep. 699; CUFF v. RAILROAD Co. (1870), 35 N. J. L. 17; 10 Amer. Rep. 209; 16 Am. Neg. Cas. 668, n.; HILLIARD v. RICHARDSON (1855), 3 Gray (Mass.), 349; 63 Amer. Dec. 743; KING v. RAILROAD Co. (1876), 66 N. Y. 181; 23 Amer. Rep. 37; BLAKE v. FERRIS, *supra*; Stevens v. Armstrong (1852), 6 N. Y. 435; HEXAMER v. WEBB, *supra*; EATON v. RAILWAY Co. (1871), 59 Me. 520; 8 Amer. Rep. 430; DeForest v. Wright (1852), 2 Mich. 368; Clark v. Railroad Co. (1854), 28 Vt. 103; Bennett v. Truebody (1885), 66 Cal. 509; 6 Pac. 329; 56 Amer. Rep. 117; 13 Am. Neg. Cas. 517, n.

³Thomps. Neg., Sec. 645, citing Peachey v. Rowland (1853), 13 C. B. 182. "If an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some *casual* act of wrong or negligence, the employer is not liable." Pickard v. Smith (1861), 10

C. B. (N. S.), 470; 7 Am. Neg. R. 158, n.; 8 Id. 264, n. "If it is conceded or established that the tort-feasor was an independent contractor, the non-liability of the employer becomes an inference in point of law, if the only reasonable deduction from the circumstances as shown is, that the injury in question resulted proximately and solely from the negligent manner in which the stipulated work was performed, or from a wrongful act which was neither a necessary nor a probable incident of that work." Note to Salliotte v. King, etc., Co. (1903, 58 C. C. A. 466, 122 Fed. Rep. 378), cited in 65 L. R. A., at p. 641, citing cases. It has been held that where the evidence is susceptible of the construction that the person employed was exercising an independent employment under the contract, it is error to refuse a charge to the effect that, if the accident was the result of the negligence of that person or of his servants, the employer is not liable. Potter v. Seymour (1859), 4 Bosw. 140. This may be too broad an assertion.

the injured person to go back of them in the line of causation, save in exceptional cases to be noted hereafter.”⁷ As is sometimes judicially declared, “there can not be more than one superior legally responsible.”⁸ The doctrine of an employer’s non-liability has also been said to rest upon “the ground that a contractor, as between him and his employer, is responsible only for the fulfillment of his agreement, and pending the performance of the work, is to a certain extent substituted for the party for whom the work is to be performed.”⁹

⁷ Burd., Torts, 133. “In ascertaining who is liable for the act of a wrong-doer, you must look to the wrong-doer himself or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back and make the employer of that person liable.” *Murray v. Currie* (1870), L. R., 6 C. P. 24; 40 L. J., C. P. 26.

⁸ *Painter v. Mayor* (1863), 46 Pa. 213; *Heidenag v. City of Philadelphia* (1895), 168 Pa. 72; 21 Atl. 1063.

⁹ *Reynolds v. Braithwaite* (1889), 131 Pa. 416; 18 Atl. 1110. The doctrine of an employer’s non-liability has also been referred to as an application of the general principle that where an independent, responsible cause is interposed between an alleged cause and the injury, the juridical connection between that alleged cause and the injury is broken. *Wharton on Neg.*, Sec. 482. In a note to a leading case, a distinguished annotator, referring to the basis of reserving control, contractual

obligation and intervening efficient cause as the tests of liability, says: “None of these explanations, however, is adequate for the purposes of a fundamental inquiry, since they presuppose that an affirmative answer should be given to what is really the ultimate question to be decided, viz., the permissibility of allowing one person to depute to another a particular piece of work, on terms which will have the effect of relieving the former from the obligation of seeing that the work is executed with reasonable care and skill. It seems clear from the not very numerous authorities which bear directly upon this question that the real, and in fact only, available basis for the doctrine which declares such a delegation of functions to be, under certain circumstances, allowable is public policy.” Note by Mr. C. B. Labatt, to the leading case of *SALLIOTTE V. KING BRIDGE Co.* (1903, Va.), reported in 65 L. R. A. “It seems clear, however,” he continues, “that the rule as to the non-liability of employ-

those cases where an independent contractor is employed. Here the person who lets the contract is not liable for the torts of the servants employed by the contractor. The reason is obvious. The conductor, or one who lets the contract, has no control over the employee of the contractor, and hence is not treated as their master. He is only concerned with the finished product of the labor, and the contractor, both in fact and in theory, is the master of those whom he employs. Simple as this appears, the principle in question was violated in probably the first case presenting facts of this kind. (*BUSH V. STEINMAN*, 1799, 1 B. & P. 404.) But that case was soon discredited, and the law is now well settled that the man who has immediate control or the right of control over the work is the master.”⁶

According to Prof. Burdick, “the liability of a master for the torts of his servant rests upon considerations of practical expediency. A man is bound to manage his affairs with a due regard for the safety of the persons and property of his fellows. But suppose he turns over the management of certain of his transactions to persons who undertake to accomplish a prescribed result, but who are not otherwise subject to his control. Must he answer for their torts which are incident to the transaction? He does, indeed, ‘set the whole thing in motion;’ but such persons are not his servants in the ordinary sense of that term. He does not direct and control their acts, and has no right to command obedience from them. They are the principals in the work which they have in hand. For damages inflicted by their misconduct or the misconduct of those under their control, they are liable, and the law does not permit

⁶ 2 Street Legal Liab., 471-472, citing *Reedie v. London*, etc., R. (1849), 4 Exch. 404; 6 Eng. R. & Corp. Cas. 184; 4 Am. Neg. R. 438, n.; 9 Id. 122, n.; *Hillard v.*

Richardson (1855), 3 Gray (Mass.), 349; 63 Amer. Dec. 743; *Pendleton v. Greenhough* (1875), 1 Q. B. D. 36.

**Sec. 48. Bush v. Steinman, 1 Bosanquet & Puller, 404.
(Easter Term, 1799, 38 Geo. III.)**

These two actions were on the case against the defendant for causing a quantity of lime to be placed on the high road, by means of which the plaintiff and his wife were overturned and much hurt, and the chaise, in which they then were, considerably damaged. Plea: Not Guilty.

The two actions came on together to be tried before Eyre, Ch. J., at the Guildhall Sittings after last Hilary term, when the following circumstance appeared in evidence. The defendant having purchased a house by the road side (but which he had never occupied), contracted with a surveyor to put it in repair for a stipulated sum; a carpenter having a contract under the surveyor to do the whole business, employed a brick-layer under him, and he again contracted for a quantity of lime with a lime burner, by whose servant the lime in question was laid in the road. The Lord Chief Justice was of opinion that the defendant was not answerable for the injury sustained by the plaintiff under the above circumstance, but in order to save expense, a verdict was taken for the plaintiff for 12 £, 12 s. with liberty to the defendant to move to have a nonsuit entered.

Accordingly a rule *nisi* for that purpose having been obtained on a former day,

v. STEINMAN, *supra*. a verdict was affirmed against a water works company, for an injury resulting to the plaintiff from the negligence of men employed by certain pipe layers with whom the company had contracted for the laying

down of certain water pipes in a public street, Lord Ellenborough stating that he had "no doubt" as to the defendant's liability; Mathews v. West London, etc., Co. (1813), 3 Camp. 403.

Sec. 47. Early Rule Stated.

At the outset, it was held that a landowner was liable for ALL injuries resulting from the negligence of employees engaged in executing work on his land, though such work was done by the servant of one who had contracted to do the work, and this general rule prevailed for a while in a few jurisdictions.¹⁰

ers has been formulated rather with reference to their interests than with reference to those of possible sufferers from the torts of the contractors. . . . The juridical situation, therefore, would seem to be simply this—that the considerations of expediency which according to the most generally accepted theory, constitute the only rational foundation of the rule which declares a master to be liable for the torts of his servant, are deemed to be inoperative, or to be superseded and overridden by other and antagonistic considerations of expediency, in some classes of cases where the person employed is exercising an independent business” (p. 634, citing *Gregory v. Hill* (1869), 8 Sc. Sess. Cas., 3d series 282; *FARWELL v. BOSTON, ETC., RAILROAD* (1842), 4 Met., Mass. 55; 38 Amer. Dec. 339; *CHICAGO, ETC., RAILROAD v. MORANDA* (1879), 93 Ills. 314; 34 Amer. Rep. 168; *Coon v. Syracuse, etc., Railroad* (1849), 6 Barb. (N. Y.), 231, and other cases).

¹⁰ *BUSH v. STEINMAN* (1799), B. & P. 404, reported in full in the next section of the text; followed in *Sly v. Edgely* (1806), 6 Esp.

6; *Randleson v. Murray* (1838), 8 A. & E. 109; 14 Am. Neg. Cas. 75; *LOWELL v. BOSTON, ETC., RAILROAD* (1839), 23 Pick. (Mass.), 24; 34 Amer. Dec. 33; *New York v. Bailey* (1845), 2 Denio (N. Y.), 433; *STONE v. CHESHIRE RAILROAD* (1849), 19 N. H. 427; 51 Amer. Dec. 192; *Wiswall v. Brinson* (1849), 10 Ired. L. (N. C.), 554; *Memphis v. Lasser* (1849), 9 Humph. (Tenn.), 760; *Nashville v. Brown* (1871), 9 Heisk. (Tenn.), 1; 24 Amer. Rep. 289; *Silvers v. Nerdlinger* (1868), 30 Ind. 53; *Meyers v. Snider* (1848), Bright (Pa.) 489. “The doctrine now under discussion is one of comparatively recent growth. An examination of the language used by the judges, the authorities cited and the arguments relied upon by the defendant’s counsel, in the earliest of the reported cases on the subject, which was decided 1799, will make it apparent that at that date the responsibility of an employer for the torts of a contractor was deemed to be the same in kind and degree as his responsibility for the torts of a servant or an agent.” Note to *SALLIOTTE v. KING BRIDGE CO.* (1903, Va.), 65 L. R. A. 624. In a case decided shortly after *BUSH*

actually laid in the high-road; that being the case, there is no authority to shew that the defendant is liable, merely because the act from which the injury arose was done for his benefit. If that general proposition were true, it might be contended, that the defendant must have answered for any accident which might have happened during the preparation of the lime in the lime-burner's yard. Secondly, The liability of the principal to answer for his agents, is founded in the superintendence and control which he is supposed to have over them. 1 Black. Com., 431. In the civil law that liability was confined to the person standing in the relation of *paterfamilias* to the person doing the injury. Inst. lib., 4, tit. 5, § 1, Dig. lib. 9, tit. 3. And though in our law it has been extended to cases where the agent is not a mere domestic, yet the principle continues the same. Now, clearly it was not in the power of this defendant to control the agent by whom the injury to this plaintiff was effected. He was not employed by the defendant, but by the lime-burner; nor was it in the defendant's power to prevent him, or any one of the intermediate subcontracting parties, from executing the respective parts of that business which each had undertaken to perform. The defendant's interference would have amounted to a breach of his own contract with the surveyor, by which the latter was empowered to employ such persons as he might think proper. So little connection was there between the defendant and the various persons employed in the work that he could have maintained no action against any one of them for having ill performed his part, but must have resorted to the surveyor with whom his contract was made. With respect to *Stone v. Cartwright*, the owner of the mine was there said to be answerable for the negligence of the persons employed by the steward, but it is to be observed, that he was also answerable to them for their wages. In *Lane v. Sir Robert Cotton*, 12 Mod.

Cockell and Shepherd, Serjts., now shewed cause. The question is not whether this action might not have been brought against some other person, but whether it cannot be maintained against the present defendant. It is sufficiently established that masters are civilly answerable for the neglect of their servants, though absent at the time of the injury committed. *Hern v. Nicholls*, 1 Salk., 289. *Jones v. Hart*, 2 Salk., 441. So it is with carriers and owners of ships. The house in this case was undergoing a repair for the defendant, and the act which caused the injury complained of, was an act done for his benefit, and in consequence of his having authorized others to work for him. Though the person by whose neglect the accident happened was the immediate servant of another, yet, for the benefit of the public, he must be considered as the servant of this defendant. The maxim in law is *respondeat superior*, and accordingly Lord Kenyon in a case strongly analogous to the present said, "In all these cases I have ever understood that the action must either be brought against the hand committing the injury or against the owner for whom the act was done." *Stone and another v. Cartwright*, 6 Term Rep., 411. If this defendant be not liable, the plaintiff may be obliged to sue all the parties who have subcontracts in this case, before he can obtain any redress for the injury he has sustained.

LeBlanc and Marshall, Serjts., *contra*. The plaintiff contends, first, that a person is liable for the consequences of every act done for his benefit; at least if the act take place on his own premises; secondly, that he is answerable for any injuries committed by those whom he employs, if the injuries happen in the course of carrying into execution the commission with which they are charged. First, it is clear that the cause of action did not in this case arise on the defendant's premises, the complaint being, that a quantity of lime which should have been placed there, was

find great difficulty in stating with accuracy the grounds on which it is supported. The relation between master and servant, as commonly exemplified in actions brought against the master, is not sufficient; and the general proposition, that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do, seems to be too large and loose. The principle of *Stone v. Cartwright*,¹¹ with the decision of which I am well satisfied, is certainly applicable to this case; but that of *Littledale v. Lord Lonsdale*¹² comes much nearer. Lord Lonsdale's colliery was worked in such a manner by his agents and servants (or possibly by his contractors, for that would have made no difference), that an injury was done to the plaintiff's house, and his Lordship was held responsible. Why? Because the injury was done in the course of *his* working the colliery; whether he worked it by agents, by servants, or by contractors, still it was his work; and though another person might have contracted with him for the management of the whole concern without his interference, yet the work being carried on for his benefit, and on his property, all the persons employed must have been considered as his agents and servants, notwithstanding any such arrangement; and he must have been responsible to all the world, on the principle of *sic utere tuo ut alienum non laedas*. Lord Lonsdale having empowered the contractor to appoint such persons under him as he should think fit, the persons appointed would in contemplation of law have been the agents and servants of Lord Lonsdale. Nor can I think it would have made any difference, if the injury complained of had arisen from his Lordship's coals having been placed by the workmen on the premises of Mr. Littledale, since it would have

¹¹ *Stone v. Cartwright* (—), 6 Term Rep. 411.

¹² *Littledale v. Lord Lonsdale* (—), 2 H. Bl. 267.

488, 9, Holt. Ch. J., said that "the reason why a principal shall answer for his deputy is, because as he, as principal, has power to put him in, so he has power to put him out without shewing any cause." So in *Michael v. Alestree*, (1677) 2 Lev. 172, it was held that an action might be maintained against a master for damage done by his servant to the plaintiff, in exercising his horses in an improper place, though he was absent, because it should be intended that the master sent the servant to exercise the horses there. But if a servant who is ordered to do a lawful act exceed his authority, and thereby commit an injury, the master is not liable. *Kingston v. Booth*, Skin. 228, *Middleton v. Fowler*, 1 Salk. 282.

EYRE, Ch. J. At the trial I entertained great doubts with respect to the defendant's liability in this action. He appeared to be so far removed from the immediate author of the nuisance, and so far removed even from the person connected with the immediate author in the relation of master, that to allow him to be charged for the injury sustained by the plaintiff seemed to render a circuituity of action necessary. Upon the plaintiff's recovery, the defendant would be entitled to an action against the surveyor, the surveyor and each of the subcontracting parties in succession to actions against the persons with whom they immediately contracted, and last of all the lime-burner would be entitled to the common action against his own servant. I hesitated, therefore, in carrying the responsibility beyond the immediate master of the person who committed the injury, and I retained my doubts upon the subject, till I had heard the argument on the part of the plaintiff, and had an opportunity of consulting with my brothers. They, including Mr. Justice Buller, are satisfied that the action will lie, and upon reflection, I am disposed to concur with them; though I am ready to confess that I

A master having employed his servant to do some act, the servant out of idleness employed another to do it, and that person in carrying into execution the orders which had been given to the servant, committed an injury to the plaintiff, for which the master was held liable. The responsibility was thrown on the principal from whom the authority originally moved. This determination is certainly highly convenient and beneficial to the public. Where a civil injury of the kind now complained of has been sustained, the remedy ought to be obvious, and the person injured should have only to discover the owner of the house which was the occasion of the mischief; not to be compelled to enter into concerns between that owner and other persons, the inconvenience of which would be more heavily felt than any which can arise from a circuitry of action. Upon the whole case, therefore, though I still feel a difficulty in stating the precise principle on which the action is founded, I am satisfied with the opinion of my Brothers.

HEATH, J. I found my opinion on this single point, viz.: That all the subcontracting parties were in the employ of the defendant. It has been strongly argued that the defendant is not liable, because his liability can be founded in nothing but the mere relation of master and servant; but no authority has been cited to support that proposition. Whatever may be the doctrine of the civil law, it is perfectly clear that our law carries such liability much further. Thus a factor is not a servant; but being employed and trusted by the merchant, the latter, according to the case in *Salkeld*, is responsible for his acts. There are besides this other cases, as where a person hires a coach upon a job, and a job-coachman is sent with it, the person who hires the coach is liable for any mischief done by the coachman while in his employ, though he is not his servant. We all remember an action for defamation brought against

been impossible to distinguish such an act from the general course of business in which they were engaged, the whole of which business was carried on either by the express direction of Lord Lonsdale, or under a presumed authority from him. The principle of this case, therefore, seems to afford a ground which may be satisfactory for the present action, though I do not say that it is exactly in point. According to the doctrine cited from Blackstone's Commentaries, if one of a family "layeth or casteth" anything out of the house which constitutes a nuisance, the owner is chargeable. Suppose, then, that the owner of a house, with a view to rebuild or repair, employ his own servants to erect a hord in the street (which being for the benefit of the public they may lawfully do), and they carry it out so far as to encroach unreasonably on the highway, it is clear that the owner would be guilty of a nuisance; and I apprehend there can be but little doubt that he would be equally guilty if he had contracted with a person to do it for a certain sum of money, instead of employing his own servants for the purpose; for, in contemplation of law, the erection of the hord would equally be his act. If that be established, we come one step nearer to this case. Here the defendant by a contractor, and by agents under him, was repairing his house; the repairs were done at his expense, and the repairing was his act. If, then, the injury complained of by the plaintiffs was committed in the course of making those repairs, I am unable to distinguish the case from that of erecting the hord, or from *Littledale v. Lord Lonsdale*, unless, indeed, a distinction could be maintained (which, however, I do not think possible), on the ground of the lime not having been delivered *on* the defendant's premises, but only at a place close to them, with a view to being carried on to the premises and consumed there. My Brother Buller recollects a case which he would have stated more particularly, had he been able to attend. It was this:

not permit him to take advantage of that circumstance in order to screen himself from an action. The case which has been supposed of the lime having been deposited at a distance from the defendant's house, and the accident having happened there, does not apply: for here a person acting under the general employment of the defendant brought a quantity of lime to the premises, and deposited it without any objection being made by any person there, whereas it was the duty of the defendant to have provided a person to superintend those employed in his work. The person from whom the whole authority is originally derived, is the person who ought to be answerable, and great inconvenience would follow if it were otherwise. There is such a variety of subcontracts in this case as rarely occurs, but this serves only to illustrate more strongly the mischief which would ensue should we depart from the doctrine in *Stone v. Cartwright*. In that case, and in *Littledale v. Lord Lonsdale*, the safest rule was adopted. The plaintiff may bring his action either against the person from whom the authority flows, and for whose benefit the work is carried on, or against the person by whom the injury was actually committed. If the employer suffer by the acts of those with whom he has contracted, he must seek his remedy against them.

Rule discharged.

Sec. 49. Basis of Early Rule Discussed.

In the case of *BUSH v. STEINMAN*, it is said, "the court principally relied upon the case of *Littledale v. Lonsdale*, 2 H. Bl. 267, wherein defendant was held responsible for an injury to the plaintiff's horse, done by persons with whom he had contracted, and not merely employed as agents or servants to work a colliery, on the ground that the col-

Tattersall, who was a proprietor of a newspaper, with sixteen others; the libel was inserted by the persons whom the proprietors had employed by contract to collect news, and compose the paper, yet the defendant was held liable. Now this is a strong case to show that it makes no difference whether the persons employed by the defendant were employed on a *quantum meruit*, or were to be paid a stipulated sum. In *Rosewell v. Prior*,¹³ an action for the continuance of a nuisance was held to lie against the defendant, though he had underlet the building which was the subject of it, and though the plaintiff had recovered against him in a former action for the erection of the nuisance; for the Court said, "He affirmed the continuance by his demise, and received rent as a consideration for it." That case is analogous to the present; the ground of the decision having been that the defendant was benefited by the nuisance complained of. It is not possible to conceive a case in which more mischief might arise than in the present, if the various subcontracts should be held sufficient to defeat the plaintiff of his action. Probably he would not be able to trace them all, since none of the parties could give him any information, and consequently he might be turned round every time he came to trial.

ROOKE, J. I am of the same opinion. He who has work going on for his benefit, and on his own premises, must be civilly answerable for the acts of those whom he employs. According to the principle of the case in 2 Lev., it shall be intended by the court that he has a control over all those persons who work on his premises, and he shall not be allowed to discharge himself from that intendment of law by any act or contract of his own. He ought to reserve such control, and if he deprive himself of it, the law will

¹³ *Rosewell v. Prior* (1702), 12 Mod. 635.

rule prevails as to real property than to personal property was soon rejected, and among the first to repudiate it were the courts which first adopted it.¹⁸ And a succession of carefully considered cases established the same views in a number of the United States.¹⁹ At the present, the distinction between realty and personalty in this connection has been generally, if not wholly, abolished.²⁰

Sec. 51. Present Rule and Tendency.

As a general thing, the doctrine of *BUSH v. STEINMAN* has been repudiated.²¹ Judge Thompson, in his exhaustive

437, n; *Rapson v. Cubbitt* (1842), 9 Mees & W. 709. Cf., *Dutton v. Amesbury National Bank* (1902), 181 Mass. 154; 63 N. E. 405; *Hardaker v. Idle District*, etc. (1896), 1 Q. B. 335; *Blattenberger v. Little Schuyskill*, etc., Co. (1839), 2 Miles (Pa.), 309.

¹⁸ *Milligan v. Wedge* (1840), 12 Ad. & El. 737; *REEDIE v. LONDON, ETC., RAILROAD* (1849), 4 Exch. 254; 4 Am. Neg. Rep. 438, n; 9 Id. 122, n; which case unanimously and definitely repudiated the distinction which formerly prevailed. To the same effect, *Gayford v. Nicholls* (1854), 9 Exch. 702.

¹⁹ *BLAKE v. FERRIS* (1851), 5 N. Y. 48; 55 Amer. Dec. 304; *Barry v. St. Louis* (1852), 17 Mo. 121; *DeForrest v. Wright* (1852), 2 Mich. 368; *Pack v. New York* (1853), 8 N. Y. 222; *HILLIARD v. RICHARDSON* (1855), 3 Gray (Mass.), 349; 63 Amer. Dec. 743; collecting and examining authorities; *BOSWELL v. LAIRD* (1857), 8 Cal. 469; 68 Amer. Dec. 345. The

doctrine of *BUSH v. STEINMAN* was expressly disapproved in *Gourdier v. Cormack* (1853), 2 E. D. Smith, 254.

²⁰ *Laugher v. Pointer*, *supra*; *BOSWELL v. LAIRD*, *supra*; *KING v. NEW YORK, ETC., RAILROAD* (1876), 66 N. Y. 181; 23 Amer. Dec. 37; *Ryder v. Thomas* (1873), 13 Hun (N. Y.), 296; *Conlin v. Charleston* (1868), 15 Rich. L. (S. C.), 201; *Benedict v. Martin* (1862), 36 Barb. (N. Y.), 288; *McCAFFERTY v. SPUYTEN DUYVIL, ETC., RAILROAD* (1874), 61 N. Y. 178; 19 Amer. Rep. 267; *Gilbert v. Beach* (1855), 16 N. Y. 606.

²¹ *Quarman v. Burnett* (1840), 6 M. & W. 499; 4 Am. Neg. R. 317, n; *HILLIARD v. RICHARDSON* (1855), 3 Gray (Mass.), 349; 63 Amer. Dec. 743; *Painter v. Pittsburgh* (1863), 46 Pa. St. 213; *Pack v. New York, etc., Railroad* (1853), 8 N. Y. 222; *CUFF v. NEWARK, ETC., RAILROAD* (1870), 35 N. J. L. 574; 10 Amer. Rep. 205; 16 Am. Neg. Cas. 668, n.; *Kellogg v. Payne* (1866), 21 Iowa,

liery was the defendant's property, was on his land, and the description of persons working it could make no difference in his responsibility. . . . See likewise *Stone v. Cartwright*, 6 T. R., 411; *Flower v. Adam*, 2 Taunt. 314; *Payne v. Rogers*, 2 H. Bl. 350; *Leslie v. Pounds*, 4 Taunt. 649;" ¹⁴ "Lord Chief Justice Eyre's opinion in *BUSH v. STEINMAN*, shows the difficulty of this doctrine, and the grounds on which it is founded." ¹⁵

Sec. 50. Distinction as to Real and Personal Property.

In an English case decided in 1826, the court rejected the broad and unqualified principle announced in *BUSH v. STEINMAN*, but were still inclined to accept the decision as binding with respect to injuries resulting from the performance of work on or near the employer's premises.¹⁶ The doctrine that an employer's liability is measured by different standards, according as the negligence complained of was committed in reference to real or personal property, was applied or recognized in several later cases, English as well as American.¹⁷ But the doctrine that a different

¹⁴ Note to *Weyland v. Elkins* (—), Holt's N. P. 227. "See, also, *Laugher v. Pointer* (1826), 5 B. & C. 547, where most of the cases are reviewed; *Hughes v. Boyer* (—), 9 Watts, 556; *Miligan v. Wedge* (1840), 12 Ad. & El. 737." Story on Agency, 9th ed., 551; *Id.* 558, *et seq.*

¹⁵ Note to Story Agcy., Sec. 454. "See this case commented on in *Duncan v. Findlater* (—), 6 Clark & F. 894, by Lords Cottenham and Brougham, where it seems to have been thought to push the doctrine of the liability of the principal to its fullest ex-

tent. Mr. Holt has appended a very able note (p. 229) on this subject to the case of *Weyland v. Elkins*, 1 Starkie, 272." (Story Agcy., 548-9.)

¹⁶ *Laugher v. Pointer* (1826), 5 Barn. & C. 547. In some of the American states this early rule was at first restricted so as to affect only realty. *STONE v. CHESHIRE RAILROAD* (1849), 19 N. H. 427; 51 Amer. Dec. 192. Questioned in *WRIGHT v. HOLBROOK* (1872), 52 N. H. 120; 13 Amer. Rep. 12.

¹⁷ *Quarman v. Burnett* (1840), 6 Mees & W. 499; 4 Am. Neg. R.

BUSH v. STEINMAN as follows: "From the foregoing review it will be apparent that, about the middle of the 19th century, almost every court which had had an opportunity of expressing its views had definitely discarded, not merely the broad principle embodied in BUSH v. STEINMAN, viz.: that a person must answer for the torts of all those who are in his employ, whether they are servants or contractors, but also the qualified doctrine upon which it had been for some time supposed that that doctrine could be supported, viz.: that a responsibility of this extent is imputable wherever the injury resulted from the execution of work on, near or in respect to, real property belonging to the employer. What may be regarded as the characteristic, as it is certainly the most important, feature of the doctrinal developments during the subsequent period is the gradual delimitation of the domain within which the general rule as to the non-liability of an employer for the torts of an independent contractor is controlled and overridden, by the principle that a person who is subject to an absolute duty can not, by delegating it to another party, relieve himself from liability for injuries caused by its non-fulfillment. An examination of the cases . . . will show that the result of working out this principle in its application to certain situations has been the formation of several groups of precedents, which in any case involving similar facts, put a plaintiff, so far as his actual right of recovery is concerned, in a position which is very nearly, if not quite, as favorable as he would have occupied if the doctrine announced in BUSH v. STEINMAN had found a permanent place in Anglo-American jurisprudence. It seems certain, however, that a plaintiff, now suing for injuries received under the same circumstances as those involved in that case, could not recover under any of the more recent doctrinal developments. The work was not intrin-

work on "Negligence," states the general rule to be "that one who has contracted with a fit and competent person, exercising an independent employment, to do a piece of work not in itself unlawful, or of such a nature that it is likely to become a nuisance, or to subject third persons to unusual danger, according to the contractor's own methods and without being subject to control except as to the results of his work, and subject to other qualifications hereafter stated, will not be answerable for the wrongs of such contractor, his subcontractors or his servants, committed in the prosecution of such work."²²

In a valuable note to one of his articles, Mr. Labatt summarizes the present tendency regarding the doctrine of

575; *Allen v. Willard* (1868), 57 Pa. St. 381; *Pawlet v. Rutland*, etc., Railroad (1855), 28 Vt. 297; *KING v. NEW YORK, ETC., RAILROAD* (1876), 66 N. Y. 181; 23 Amer. Rep. 37; *Ryder v. Thomas* (1878), 13 Hun (N. Y.), 296. "But the authority of *BUSH v. STEINMAN* has been in the modern cases either entirely denied or much doubted." Note to Story Agcy., 5th ed., p. 551, citing *Knight v. Fox* (1850), 5 Exch. 721; *Overton v. Freeman* (1852), 11 C. B. 367; 9 Am. Neg. R. 122, n.; *HILLIARD v. RICHARDSON*, *supra*; *Reddie v. London*, etc., Railroad (1849), 4 Exch., 244; 6 Eng. R. & Corp. C. 184. "The great weight of modern decisions upon this question establishes the rule that where the relation of independent contractor exists as to the use of real property, and the party employed is skilled in the performance of the duty he undertakes and the thing directed to

be done is not in itself a nuisance, or will not necessarily result in a nuisance, the injury resulting, not from the fact that the work is done, but from the negligent manner of doing it by the contractor or his servants, the owner cannot be made to respond in damages." *Robinson v. Webb* (1875), 11 Bush (Ky.), 464.

²² *Thomps. Neg.*, Sec. 621. He adds in a foot note that he states "the rule broadly bringing into use all the well recognized qualifications," and cites a multitude of cases supporting the rule stated, though some of them exclude some of the qualifications. A tenant consented to his landlord's making repairs; he engaged an independent contractor through whose negligence the tenant was injured; the landlord was held not liable. *Jefferson v. Jameson*, etc., Co. (1897), 165 Ills. 138; 46 N. E. 272. See *post*, Secs. 106-109.

doctrine of an employer's non-liability "is frequently put upon the ground that the characteristic incident of the relation created by an independent contract is, that the employer has not the power of controlling the person employed in respect to the details of the stipulated work, and that it is a necessarily juridical consequence of this situation that the former should not be answerable for an injury resulting from the manner in which those details may be carried out by the latter."²⁶ In a recent California case, the court said in part: "Moreover, upon the face of these facts, it would be a conclusion amounting almost to absurdity to say that the F. Bros. (employers) who were shown to be no more than farmers and unskilled in dredging work and in the use of dredgers, should be held accountable for the necessary details in the proper performance of an undertaking such as this (2½ miles of 20-foot ditching), and that it was or ever could have been contemplated that they and not the (defendant) dredging company knew how the work should have been performed, . . . and that they had undertaken the legal responsibility," etc.^{26a}

Sec. 53. General Rule as to Liability of Municipalities.

The rule exempting the proprietor from liability for damages where the work is done by an independent contractor is, in general, the same in its application to a

Y. 222. Under a general denial it is not error to charge that "where one has a lawful work to do and employs another who has an independent business of his own, including work of that class, to do it, and where the employer himself does not exercise any direction as to how it shall be done, he is not responsible for any wrong that the employee may commit in

the course of the work." *Harrison v. Kiser* (1887), 79 Ga. 588; 4 S. E. 320.

²⁶ Note to *SALLIOTTE v. KING BRIDGE Co.* (1903), 58 C. C. A. 466; 122 Fed. 378; 65 L. R. A., p. 632.

^{26a} *Teller v. Bay, etc., Co.* (1907), — Cal. —; 90 Pac. 942; 12 L. R. A. (N. S.), 273.

sically dangerous, nor was there a violation of any absolute duty which the employer was bound, at his peril, to see performed. How far these encroachments upon the older doctrine of non-liability will be carried remains to be seen. In this respect the law is at present in a transition state. But in view of the trend of judicial opinion, as indicated by the most recent decisions, it seems perfectly safe to predict, that in some directions at least, the immunity of the employer will continue to be more and more abridged.”²³

Sec. 52. Effect of Non-interference.

Ordinarily, as implied in preceding sections, the proprietor is not liable when he does not interfere with the manner of conducting the work.²⁴ Where a railroad company employs an engineer to superintend the general progress of the construction of its road and to see that the work is done according to contract, the railroad company is not liable for the acts of its independent contractor.²⁵ The

²³ Note to *SALLIOTTE v. KING BRIDGE Co.* (1903), 58 C. C. A. 466; 122 Fed. 378, in 65 L. R. A., at pp. 631-632.

²⁴ *LARSON v. METROPOLITAN STREET RAILROAD* (1892), 110 Mo. 234; 19 S. W. 416; 16 L. R. A. 330; 33 Amer. St. Rep. 439. See *ante*, Secs. 18, 19. An early Pennsylvania case says it is settled in England “that defendants, not personally interfering or giving directions respecting the progress of a work, but contracting with a third person to do it, are not responsible for a wrongful act done or negligence in the performance of the contract if the

act agreed to be done is legal.” *Painter v. Pittsburgh* (1863), 46 Pa. 213; *Edmundson v. Pittsburgh, etc., Railroad* (1885), 111 Pa. 316; 2 Atl. 404.

²⁵ *Clark v. Hannibal, etc., Railroad* (1865), 36 Mo. 202; *Callahan v. Burlington, etc., Railroad* (1867), 23 Iowa, 562; *EATON v. EUROPEAN, etc., RAILROAD* (1871), 59 Me. 520; 8 Amer. Rep. 430; *REEDIE v. LONDON, etc., RAILROAD* (1849), 4 Exch. 244; 6 Eng. R. & Corp. Cas. 184; *ERIE v. CALKINS* (1877), 85 Pa. St. 247; 27 Amer. Rep. 642; *Reed v. Alleghany* (1875), 79 Pa. St. 300; *Pack v. New York* (1852), 8 N.

the rule of exemption is subject to the qualification that such corporations are under the absolute duty of exercising reasonable care to the end that their streets and sidewalks are kept free from nuisances and safe for the public travel; and it is obvious that they are just as much bound to exercise this care for the prevention and removal of obstructions, pitfalls or other nuisances placed there by their own contractors as when they are placed there by mere passersby.²⁹

v. New Orleans (1905), 114 La. 253; 38 So. 160; Wright v. Muskegon (1905), 140 Mich. 215; 103 N. W. 558; Haefelin v. McDonald (1904), 96 App. Div. 213; 89 N. Y. Supp. 395; Jewell v. Mt. Vernon (1904), 91 App. Div. 578; 87 N. Y. Supp. 120; Kelly v. New York (1905), 106 App. Div. 576; 94 N. Y. Supp. 872. It has also been held that a city which enters into a contract whereby the contractor undertakes to carry off the garbage and refuse collected in the city, to some point in Lake Michigan not less than fifteen miles from the city, and there dump it into the lake, the city reserving to itself the right to relet the contract in case of improper or imperfect performance, is not liable for damages to fishing nets resulting from the garbage being carried into them by the ordinary movements of the water; Kuehn v. Milwaukee (1896), 92 Wisc. 263; 65 N. W. 1030, a decision which Judge Thompson declares "*proceeds*, with a poor sense of justice, in disregard of the principle that the proprietor is liable where the in-

jury proceeds from the nature of the work itself." Thoms. Neg., p. 603.

²⁹ JEFFERSON V. CHAPMAN (1889), 27 Ills. App. 43; 127 Ills. 428; 20 N. E. 33; Thoms. Neg., Sec. 533, *et seq.* If this principle of liability is properly carried out it will go far toward making a municipal corporation liable for defects in highways, public sewers, and other public improvements which are the result of the negligent manner of doing public work by its contractors, if under the rule obtaining in the given jurisdiction, such liability attaches to municipal corporations under any circumstances. Beatrice v. Reid (1894), 41 Nebraska 214; 59 N. W. 770. The general rule has been extended so far as to exempt a municipal corporation from liability for injuries to third persons occasioned by the negligence of workmen engaged in grading a street, under the direction of a person who has entered into a contract with the corporation to perform the work in conformity to a plan referred to in the contract, for a specified sum, to be

municipal corporation, as to any other proprietor. A municipal corporation is generally not liable for the negligence of an independent contractor or his employees; this, however, is subject to certain exceptions stated later.²⁷ Broadly speaking, a city will not be liable for the negligent performance of a contract by one who, for an agreed compensation, undertakes its performance, and the city retains no control or supervision over the methods or manner of work.²⁸ When applied to municipal corporations

²⁷ *Nevins v. Peoria* (1866), 41 Ills. 502; *McFadden v. Jewell* (1903), 119 Iowa, 321; 93 N. W. 302; 97 Amer. St. Rep. 321; 60 L. R. A. 401 (cleaning highways of weeds); *Barry v. St. Louis* (1852), 17 Mo. 121; *Hilsdorf v. St. Louis* (1869), 45 Mo. 94, 98; 100 Amer. Dec. 352; *Jansen v. Jersey City* (1898), 61 N. J. Law, 243; 39 Atl. 1025; 4 Am. Neg. Rep. 313 (building city hall; a doubtful decision); *Kelly v. New York* (1854), 11 N. Y. 432; *Pack v. New York* (1853), 8 N. Y. 222; *Uppington v. New York* (1901), 165 N. Y. 222; 59 N. E. 91; 53 L. R. A. 550; 6 Am. Neg. Rep. 366 (constructing sewer; a doubtful decision); *Erie v. Caulkins* (1877), 85 Pa. St. 247; 37 Amer. St. Rep. 642; *Ginther v. Yorkville* (1897), 3 Pa. Super. 403 (laying water pipes and erecting fire plugs); *Painter v. Pittsburgh* (1863), 46 Pa. St. 213; *Reed v. Alleghany City* (1875), 79 Pa. St. 300; *White v. Philadelphia* (1902), 201 Pa. St. 512; 51 Atl. 332 (in which an independent contractor employed in dredging out a canal flooded fields adjoin-

ing; the damage which ensued would have been avoided by the construction of a dam with a bypass for carrying off the water); *Howarth v. McGugan* (1893), 23 Ont. Rep. 396; 47 Am. & Eng. Corp. Cas. 133 (contract for repair of highway). To the contrary are: *Delmonico v. New York* (1848), 1 Sandf. S. C. (N. Y.), 222; *Nashville v. Brown* (1871), 9 Heisk. (Tenn.), 1; 24 Amer. Rep. 289; *Bush v. Steinman* (1799), 1 Bos. & Pul. 404; *Hilliard v. Richardson* (1855), 3 Gray (Mass.), 363; 63 Amer. Dec. 742. Commenting on some of these cases, Judge Thompson in his *Commentaries on Negligence* says at Sec. 5803, note 197: "This (*Bush v. Steinman*) is one of the most distinctly overruled cases in the books; *Nashville v. Brown*, *supra*, which follows it, is entirely out of line with the current of American authority." See *ante*, Sec. 38*m*.

²⁸ *Koontz v. District of Columbia* (1904), 24 App. (D. C.), 59; *Bennett v. Mt. Vernon* (1904), 124 Iowa, 537; 100 N. W. 349; 16 Am. Neg. Rep. 612, n; *LaGroue*

view that a contract by a railroad company with another person or corporation for the construction of its road, is not such a delegation of its chartered rights as will render it liable for unauthorized wrongs committed by the contractor or his servants in the prosecution of the work. Therefore, a railroad company will not be liable to a third person for a nuisance resulting from a negligent or improper construction of the road by the construction company occupying the position of an independent contractor, even though (in the view of one court) it is notified that the work is being improperly done.³³

Sec. 56. Same as to Other Undertakings.

Defendants, owning a sugar refinery, employed a rigger to remove machinery from a railroad car to their refinery. In doing the work he opened a coal hole in the sidewalk, and left it open a few minutes after finishing the work, and a child fell into it and was injured. It appeared that the defendants neither directed nor interfered with the manner of the work, and it was therefore held that, as the rigger was an independent contractor, they were not liable for the injury.³⁴ One is not liable for the negligent piling of lumber by another who has contracted to take the lumber from a car, pile and dry it, use a portion of it in making articles to be paid for by the piece, and turn the rest over to the former for use on portions of the premises remaining

Eng. R. Cas. 234; St. Louis, etc., Railroad v. Willis (1888), 38 Kans. 330; 16 Pac. 728; 33 Am. & Eng. R. Cas. 397. See *post*, Secs. 115, 116, *et seq.*, for discussion of the liability of railway companies when the alleged independent contractor's work involves the exercise of the fran-

chise rights and duties of such railway companies.

³³ ATLANTA, ETC., RAILROAD V. KIMBERLEY (1891), 87 Ga. 161; 13 S. E. 277; 27 Amer. St. Rep. 231.

³⁴ Harrison v. Collins (1878), 86 Pa. St. 153; 27 Amer. Rep. 699, cited in Tiff. Dom. Rels., 509. See, generally, Sec. 38, *ante*.

Sec. 54. Same as to School Districts.

In Iowa, in a suit against a school district for an injury to a child received from the machine of a well borer while boring a well in the schoolhouse yard, the plaintiff failed to recover damages because the negligence was shown to have been that of an independent contractor.³⁰

Sec. 55. Same as to Railroad Companies.

The general rule of non-liability relieves a railroad company from liability for injuries due to the negligence of contractors where the work they are engaged in performing is not essentially hazardous, and ordinary care has been used in the selection of the contractors.³¹ Where the railroad company has not committed the execution of any of its franchises to contractors employed by it to build its road, the courts in general hold that it stands under the same immunity from liability to answer for the wrongs done by an independent contractor, whom it employs merely to produce certain results and over whose methods it exercises no control, as that which attaches, under like circumstances, to any other proprietor.³² The cases cited proceed upon the

paid for by the corporation. *Pack v. New York* (1852), 8 N. Y. 222; *Kelly v. New York* (1854), 11 N. Y. 432. These authorities are, however, challenged, as see *post*, Sec. 143.

³⁰ *Wood v. Independent School District* (1876), 44 Iowa, 27. Cf., Sec. 22, n.

³¹ *NORFOLK, ETC., RAILROAD v. STEVENS* (1899), 97 Va. 631; 34 S. E. 525; 46 L. R. A. 367; *Reilly v. Chicago, etc., Railroad* (1904), 122 Iowa, 525; 98 N. W. 464; 33 Am. & Eng. R. Cas. (N. S.), 418;

16 Am. Neg. R. 611, n. See, also, Sec. 38g, *ante*.

³² *ROME, ETC., RAILROAD v. CHASTEEN* (1889), 88 Ala. 591; 7 So. 94; 40 Am. & Eng. R. Cas. 559; *ST. LOUIS, ETC., RAILROAD v. YONLEY* (1900), 53 Ark. 503; 14 S. W. 800; 9 L. R. A. 604; 45 Amer. & Eng. R. Cas. 578; *McCann v. King's County, etc., Railroad* (1892), 46 N. Y. St. Rep. 327; 19 N. Y. Supp. 668; *Miller v. Minnesota, etc., Railroad* (1888), 76 Iowa, 665; 39 N. W. 188; 14 Amer. St. Rep. 258; 38 Am. &

The subcontractor becomes the principle in the execution of that part of the work committed to him, and for his torts, neither the original contractor nor his employer is liable, save in the excepted cases already referred to and more fully discussed in the succeeding chapters.⁴¹ If a general contractor of work, in turn, sublets the whole, or portions of the work to independent contractors, he will occupy towards them, in respect of liability for their wrongs, a position analogous to that which is occupied by a proprietor toward an independent contractor; that is, he will not be liable for the wrongs committed by such subcontractors or their servants, except in cases where a proprietor would be liable, under like circumstances, for the wrongs of an independent contractor or his servants.⁴² Ordinarily a subcontractor is not liable for the negligence of *his* subcontractor; and so on down as far as successive independent employments may obtain.⁴³ *A fortiore* the employer of the principal contractor is not liable for the torts of a subcontractor.⁴⁴ "The employer is not respon-

⁴¹ Burd. Torts, 145, citing Overton v. Freeman, *supra*; Beberich v. Ebach (1890), 131 Pa. St. 165; 18 Atl. 1008; POWELL v. CONSTRUCTION CO. (1890), 88 Tenn. 692; 13 S. W. 691; 17 Amer. St. Rep. 925.

⁴² CUFF v. NEWARK, ETC., RAILROAD (1870), 35 N. J. Law, 15, 574; 16 Am. Neg. Cas. 668, n.; 16 Amer. Rep. 205; Slater v. Mercereau (1876), 9 Mees. & W. 710; Rapson v. Cubbitt (1842), 9 Mees. & W. 710; Overton v. Freeman, *supra*; Beberich v. Ebach, *supra*; POWELL v. VIRGINIA, ETC., CO., *supra*. The fact that a building is to be erected under the supervision of an architect and

the right to make alterations is reserved, does not change the relation so as, of itself to make the contractor liable for his subcontractor's negligence. Green v. Soule (1904), 145 Cal. 96; 78 Pac. 337; 17 Am. Neg. R. 8.

⁴³ Knight v. Fox (1850), 5 Exch. 721; 20 L. J. Exch. 9.

⁴⁴ McLean v. Russell (1850), 12 Sc. Sess. Cas., 2d series, 887; MOORE v. SANBORN (1853), 2 Mich. 519; 59 Amer. Dec. 209. If the relation between a contractor and a subcontractor is not that of master and servant, the subcontractor and not the contractor is liable, generally, for his own wrongs and those of his serv-

in his control, the owner having no control or supervision as to the piling.³⁵ The following have been held independent contractors for whose acts the owner was not liable: A stair builder's servants improperly placed cleats on defendant's stairs to protect them from injury before being painted;³⁶ a contractor failed to safeguard a trench;³⁷ a contractor failed to barricade and place lights on a pile of sand.³⁸

Sec. 57. General Rule as to Subcontractors.

The same rules apply in determining responsibility for the acts of a subcontractor as in the case of a principal contractor.³⁹ Broadly stated, the principle which exonerates a proprietor from liability for the negligence of an independent contractor applies, subject to the same qualification as to control, as between the contractor and the subcontractor, and exempts the former from liability for the negligence of the latter.⁴⁰ A subcontractor's torts are governed by the rules applicable to the original contractor.

³⁵ *WRIGHT v. BIG RAPIDS, ETC.*, Co. (1900), 124 Mich. 91; 82 N. W. 829; 50 L. R. A. 495.

³⁶ *Louthan v. Hewes* (1902), 138 Cal. 116; 70 Pac. 1065; 16 Am. Neg. R. 613, n.

³⁷ *Ridgeway v. Downing Co.* (1900), 109 Ga. 591; 34 S. E. 1028; 7 Am. Neg. R. 218.

³⁸ *HOFF v. SHOCKLEY* (1904), 122 Iowa, 720; 98 N. W. 573; 101 Amer. St. Rep. 289; 64 L. R. A. 538; 16 Am. Neg. Rep. 607, n. See, for further illustrations, *ante*, Sec. 38.

³⁹ *Barrows on Neg.*, p. 166, citing *CUFF v. RAILROAD Co.* (1870), 35 N. J. Law, 17; 10 Amer. Rep.

205; *Burd. Cas.* 403; 16 Am. Neg. Cas. 668, n.; *New Orleans, etc., Railroad v. Reese* (1864), 61 Mass. 581; 18 Am. & Eng. R. Cas. 110; *The Harold* (1884), 21 Fed. 428; *Hawke v. Brown* (1898), 28 App. Div. 37; 50 N. Y. Supp. 1032; *Rapson v. Cubbitt* (1842), 9 Mees. & W. 710; *Knight v. Fox* (1850), 5 Exch. 721; *Overton v. Freeman* (1853), 11 C. B. 867; 9 Am. Neg. R. 122, n.

⁴⁰ *Pioneer, etc., Co. v. Hansen* (1898), 176 Ills. 100; 52 N. E. 17; 3 Am. Neg. R. 16; *Schutte v. United, etc., Co.* (1902), 68 N. J. Law, 435; 53 Atl. 204; 16 Am. Neg. R. 614, n.

CHAPTER III.

EMPLOYERS' EXCEPTIONAL LIABILITY—I. CHARACTER OF WORK.

SECTION	SECTION
65. Exceptions to general rule.	72. Work dangerous <i>per se</i> ; general rule.
66. Doctrine of collateral negligence.	73. Same—Blasting.
67. Contract work a nuisance.	74. Same—Fires.
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Sec. 65. Exceptions to General Rule.

While in a large majority of cases, there is no sufficient legal reason, founded on public policy or on the relations of the parties, why the employer should be liable to third parties for the negligence of the contractor or of his servants, there are nevertheless certain duties of so grave a nature that the responsibility for their performance can not be avoided by delegation. In some cases, as already noted, a person harmed by the tort of an independent contractor is allowed to go beyond the general principle of exemption of his employer and seek redress from such contractor's employer. The extent of this exceptional liability is a question upon which the courts of this country and of England are not agreed. Its narrowest limits are apparently those fixed by the recent decisions of New York, as shown later in this section. There is, in not a few instances, a conflict of authority as to whether a particular state of

sible for the negligence of the independent contractor or his sub-agents while the work is in progress, unless (a) he is negligent in the selection of the contractor; or unless (b) the object of the contract is unlawful; or unless (c) he has omitted to perform an absolute, personal duty."⁴⁵

Sec. 58. General Rule After Acceptance.⁴⁶

If the work has been completed and accepted by the employer, his immunity from responsibility for any dangerous elements that it may contain ceases, and his liability is determined by the rules of law ordinarily applicable to the breach of the duties of ownership and control.⁴⁷ After the work of the contractor is completed and the owner resumes control of his property he is, of course, liable for its safe condition. It is sometimes a nice question whether the owner has resumed control, but this is said to be essentially a question of fact and not of law.⁴⁸ If the contractor abandons the work the employer's immunity has been held to cease, and the ordinary rules of an owner's liability to apply.⁴⁹

ants. *Johnson v. Ott* (1893), 155 Pa. St. 17; 25 Atl. 751; *Dalyell v. Tyrer* (1858), 28 Law J., Q. B., 52.

⁴⁵ Barrows on Neg., Sec. 60, black letter text. For the employer's liability regarding a foreign contractor, see *Sanford v. Pawtucket Street Railroad* (1896, R. I.), 33 L. R. A. 564.

⁴⁶ See *ante*, Sec. 19; *post*, Sec. 173, *et seq.*

⁴⁷ *Donovan v. Transit Co.* (1884), 102 Cal. 245; 36 Pac. 517;

Read v. Fire District (1898), 20 R. I. 574; 40 Atl. 760; 4 Amer. Neg. Rep. 589.

⁴⁸ Huff. Agcy., 2d ed., Sec. 227, citing *Read v. East Providence Fire District*, *supra*; *Higgins v. Western Union Telegraph Co.* (1898), 156 N. Y. 75; 50 N. E. 500; 66 Amer. St. Rep. 537. See *post*, Sec. 174, *et seq.*

⁴⁹ *Savannah, etc., Railroad v. Phillips* (1892), 90 Ga. 829; 17 S. E. 82.

The exceptions to the rule that an employer is not liable for the negligence of an independent contractor or of his servants are stated as follows in a leading Georgia case: (1) When the work is wrongful in itself, or if done in the ordinary manner would result in a nuisance, the employer will be liable for injury resulting to third persons, although the work is done by an independent contractor. (2) If, according to previous knowledge and experience, the work to be done is in its nature dangerous to others, however carefully performed, the employer will be liable, and not the contractor, because it is said, it is incumbent upon him to foresee such danger and take precautions against it, . . . and in this exception is included the principle that where the injury is caused by defective construction, which was inherent in the original plan of the employer, the latter is liable. (3) Where the wrongful act is the violation of a duty imposed by express contract upon the employer; for where a person contracts to do a certain thing, he can not evade liability by employing another to do that which he has agreed to perform. (4) Where a duty is imposed by statute. The person on whom a statutory obligation is imposed is liable for any injury that arises to others from its non-performance or in consequence of its having been negligently performed, either by himself or by a contractor employed by him. (5) The employer may also make himself liable by retaining the right to direct and control the time and manner of executing the work, or by interfering with the contractor and assuming control of the work, or of some part of it, so that the relation of master and servant arises, or so that an injury ensues which is traceable to his interference. But merely taking steps to see that the contractor carries out his agreement, as having the work supervised by an architect or a superintendent, does not make the employer liable; nor does reserving the right to

facts and circumstances brings the case within the general rule, relieving the employer from liability, or causes it to fall within one of the exceptions which render the employer liable. It has been declared that "the various qualifying elements . . . are not all referred to in any single judicial announcement of the doctrine."¹ But, as appears in the succeeding paragraph, several authorities have undertaken to enumerate the exceptional cases in which the employer will still be liable.

"The general rule of an employer's non-liability is subject to certain exceptions which have been thus stated: (1) If a contractor faithfully perform his contract, and a third person is injured by the contractor in the course of its due performance or by its result, the employer is liable, for he causes the precise act to be done which occasions the injury; but for the negligence of the contractor not done *under* the contract, but in violation of it, the employer is in general not liable. . . . (2) If I employ a contractor to do a job of work for me which, in the progress of its execution, obviously exposes others to unusual perils, I ought, I think, to be responsible on the same principle as in the last case, for I caused acts to be done which naturally expose others to injury. . . . (3) If I employ as contractor a person incompetent or untrustworthy, I may be liable for injuries done to third persons by his carelessness in the execution of his contract. . . . (4) The employer may be guilty of personal neglect connecting itself with the negligence of the contractor in such manner as to render both liable."²

¹ Note to *SALLIOTTE v. KING BRIDGE Co.* (1903, Fed.), 65 L. R. A. 622.

² *Lawrence v. Shipman* (1873), 39 Conn. 586, 589, per Seymour, J. "The employer cannot avoid responsibility for the negligent con-

duct of his contractor where (a) a positive duty is imposed by contract or general law; (b) an obligation is imposed by statute; (c) the work to be done is intrinsically dangerous." *Barrows on Neg.*, Sec. 63, black letter text.

imposed on the proprietor.”⁵ “Where the employer personally interferes with the work and the acts performed by him occasion the injury; where the thing contracted to be done is unlawful; where the acts performed create a public nuisance; and where the employer is bound by statute to do a thing efficiently and an injury results from its inefficiency; these are the only cases where a person employing a contractor is liable for his torts.”⁶

“The rule of independent contractor (*i. e.*, employer) and non-liability for the negligence of a contractor employed by him, or by the agents or servants of the latter, is subject to exceptions: First, when duties are imposed upon him by law, (*a*) by statute or ordinances, (*b*) by express contract to indemnify: Second, where the employer is at fault, (*a*) in defective construction inherent in the plan, (*b*) where he retains the right to direct the time and manner of work, (*c*) ratifies or adopts unauthorized wrongs, (*d*) by not furnishing proper appliances required by law, (*e*) interfering with the work, or (*f*) is negligent in selecting a careful contractor: Third, where the work

⁵Thomps. Neg., Sec. 646, citing *MCCAFFERTY v. SPUYTEN DUYVIL, ETC., RAILROAD* (1874), 61 N. Y. 178; 19 Amer. Rep. 267; *Ryder v. Thomas* (1878), 13 Hun (N. Y.), 296.

⁶*BERG v. PARSONS* (1898), 156 N. Y. 109; 50 N. E. 957; 41 L. R. A. 391; 66 Amer. St. Rep. 542; 4 Am. Neg. Rep. 432; 47 Cent. L. J., 237; *Burd. Cas. Torts*, 406, note. “It will be observed that the New York doctrine recognizes and expresses such a duty (a duty which the employer can not assign to a contractor) in

three classes of cases: 1, Where the work contracted for is unlawful; 2, where it amounts to a public nuisance; 3, where a statute imposes the duty. To this extent, then, all the authorities are agreed. Undoubtedly, the weight of authority favors the recognition and enforcement of such a duty; also, when ‘according to previous knowledge and experience the work to be done is in its nature dangerous to others, however carefully performed.’” *Burd., Torts*, 141.

dismiss incompetent workmen. (6) The employer may also be held liable upon the ground that he has ratified or adopted the unauthorized wrong of the independent contractor.”³

In a very recent Tennessee case, the court says: “While the general rule is that the proprietor or employer is not liable for the negligence of his contractor and the servants and assistants of the latter, yet there are well established exceptions and limitations to it. These exceptions in general are: Where the act contracted to be done is wrongful or tortious in itself; where the injury is the direct or necessary consequence of the work to be done; where the thing to be done or the manner of its execution involves a duty to the public incumbent on the proprietor or employer; where the work contracted for is intrinsically dangerous, and the performance of the contract will probably result in injury to third persons or the public; and where the proprietor interferes with the contractor in the performance of the work. Nor does the general rule apply where the work has been completed and accepted.”⁴

“As well stated in recent New York cases, there are but three cases in which the owner of *fixed* property is responsible for acts done upon it which results in injury to another; (1) Where the person doing the act stands towards the proprietor in the relation of employee or servant; (2) where the act as authorized by a contract between the proprietor and actor *necessarily* produced the injury; (3) where the injury was occasioned by the omission of some duty

³ ATLANTA, ETC., RAILROAD V. KIMBERLEY (1891), 87 Ga. 161; 13 S. E. 277; 27 Amer. St. Rep. 231.

⁴ MCHARGE V. NEWCOMER (1907), 117 Tenn. 595; 100 S. W. 700; 9 L. R. A. (N. S.), 298. “It is

conceded that upon ground of public policy certain exceptions are made by law to the general rule.” YOUNG V. FOSBURG LUMBER CO. (1908, N. C.), 60 S. E. 654; 16 L. R. A. (N. S.), 255.

contractor is required to do, or the case comes within one of the generally accepted exceptions.⁹

That a proprietor can not relieve himself from liability simply by means of an agreement to that effect with the contractor has been repeatedly asserted.¹⁰ "This principle (that the proprietor can not relieve himself from liability by an agreement with the contractor) may be generalized and enlarged by stating that no proprietor can be allowed,

⁹ SALLIOTTE v. KING BRIDGE CO. (1903), 122 Fed. 378; 58 C. C. A. 466; 65 L. R. A. 620; 16 Am. Neg. R. 615, n.; Green v. Soule (1904), 145 Cal. 96; 78 Pac. 337; Crudup v. Schreiner (1901), 98 Ills. App. 337; Aldritt v. Gillette, etc., Co. (1902), 85 Minn. 206; 88 N. W. 741.

¹⁰ COVINGTON, ETC., BRIDGE CO. v. STEINBROCK (1899), 61 Ohio St. 215; 55 N. E. 618; 76 Amer. St. Rep. 325; 7 Am. Neg. R. 154; Vosbeck v. Kellogg (1899), 78 Minn. 176; 80 N. W. 957; Keys v. Second Baptist Church (1904), 99 Me. 108; 59 Atl. 446; 17 Am. Neg. Rep. 526. In a note to COVINGTON, ETC., CO. v. STEINBROCK, *supra*, are cited the following cases: Bower v. Peate (1876), 1 Q. B. D. 321; 15 Am. Neg. Rep. 645; Tarry v. Ashton (1876), 1 Q. B. D. 314; 7 Am. Neg. R. 157, n.; Hughes v. Percival (1883), 8 App. Cas. 443; Dalton v. Angus (1881), 6 App. Cas. 829; 7 Am. Neg. Rep. 157, n.; HOLE v. RAILWAY CO. (1861), 6 H. & N. 488; 7 Am. Neg. R. 157, n.; 8 Id. 301, n.; Gray v. Pullen (1864), 5 B. & S. 970; 7 Am. Neg. Rep. 158, n.; Hardaker v. Idle District

(1896), 1 Q. B. D. 335; STORRS v. CITY OF UTICA (1858), 17 N. Y. 104; 72 Amer. Dec. 437; Spence v. Schultz (1894), 103 Cal. 208; 37 Pac. 220; Stevenson v. Wallace (1876), 27 Gratt. (Va.), 77; WATER CO. v. WARE (1872), 16 Wall. 566; 21 L. Ed. 485; Black v. Finance Co. (1894), App. Cas. 48; 7 Am. Neg. Rep. 158, n. See, also, PITTSFIELD, ETC., CO. v. SHOE CO. (1902), 71 N. H. 522; 53 Atl. 807; 60 L. R. A. 116; DAVIS v. SUMMERFIELD (1903), 133 N. C. 325; 45 S. E. 654; 63 L. R. A. 492; 92 Amer. St. Rep. 781; 16 Am. Neg. Rep. 611, n.; STURGES v. SOCIETY (1881), 130 Mass. 414; 39 Amer. Rep. 463; GORHAM v. GROSS (1878), 125 Mass. 232; 28 Amer. Rep. 234; Mechem Agcy., Secs. 747-8; Whart. Neg., Sec. 185; Wood, Master & S., Sec. 316; Shear. & R. Neg., Sec. 176; Pickard v. Smith (1861), 10 C. B. (N. S.), 470; 7 Am. Neg. R. 158, n.; 8 Id. 264, n.; Penny v. Council (1898), 2 C. B. 392; 7 Am. Neg. Rep. 158, n.; Halliday v. Telephone Co. (1899), 2 Q. B. 392; Lawrence v. Shipman (1873), 39 Conn. 586, 589.

to be done is wrongful or dangerous in itself (*a*) that it would ordinarily cause a nuisance, (*b*) where the job in its very construction ordinarily becomes dangerous, however carefully performed.”⁷

The exceptions are sometimes covered by statute. Thus, Sec. 3819 of the Georgia Civil Code provides: “The employer is liable for the negligence of the contractor: (1) When the work is wrongful in itself, or if done in the ordinary manner, would result in a nuisance; (2) or if, according to previous knowledge and experience, the work to be done is in its nature dangerous to others, however carefully performed; (3) or if the wrongful act is in violation of a duty imposed by express contract upon the employer; (4) or if the wrongful act is in violation of a duty imposed by statute; (5) or if the employer retains the right to direct or control the time and the manner of executing the work, or interferes and assumes control, so as to create the relation of master and servant, or so that an injury results which is traceable to his interference; (6) or if the employer ratifies the unauthorized wrong of the independent contractor.”⁸

Under the general rule, it is likewise commonly held that the contractor will not be liable to third persons for the negligent act of his subcontractor unless the thing contracted to be done is necessarily a nuisance, or the injury is a direct result of the act or thing which the independent

⁷ *Lytle v. Conover Bldg. Co.* (1902), 12 Oh. Dec. 346; 11 Am. Neg. R. 641, n.

⁸ This section was applied in *Ridgeway v. Downing Co.* (1900), 109 Ga. 591; 34 S. E. 1028; 7 Am. Neg. Rep. 218. An analogous

statute (Art. 2320, La. Rev. Code) was held not to apply to the manner in which the independent contractor performed his work in *Gallagher v. Southwestern, etc., Association* (1876), 28 La. Ann. 943.

Sec. 66. Doctrine of Collateral Negligence.

The negligence of the contractor or of his servants for which the employer is held answerable, in the exceptional cases enumerated, is often spoken of as not collateral to the work, but directly involved in it.¹³ "The rule relieving the employer from the acts of an independent contractor is limited to collateral or casual torts of the independent contractor, and does not extend to injuries resulting from the unlawfulness of the work itself, or to injuries which are a necessary consequence of executing the work in the manner provided for in the contract or subsequently prescribed by the employer, or to those which are caused by the violation of some absolute, nondelegable duty which the employer is bound to discharge, or to those which are due to some other specific act of negligence on the part of the employer himself."¹⁴ If the act or neglect, which produces the injury, is purely collateral to the work contracted for, and entirely the result of the wrongful act of the contractor and his workmen, the proprietor is not

(1891), 87 Ga. 161; 13 S. E. 277; 27 Amer. St. Rep. 231; *ENGEL v. EUREKA CLUB* (1893), 137 N. Y. 100, 104; 32 N. E. 52; 22 Amer. St. Rep. 695.

¹³ Burd. Torts, p. 141, citing *HOLE v. RAILWAY Co.* (1861), 6 H. & N. 488; 7 Am. Neg. R. 157, n.; 8 Id. 301, n.; *Bower v. Peate* (1876), 1 Q. B. D. 321; 45 L. J. (Q. B.), 446; 11 Am. Neg. R. 645; *Pye v. Faxon* (1892), 156 Mass. 471; 31 N. E. 640; *WATER Co. v. WARE* (1872), 16 Wall. (U. S.), 566.

¹⁴ Note to *SALLIOTTE v. KING BRIDGE Co.* (1903, 58 C. A. 466, 122 Fed. 378), in 65 L. R. A. 621,

622. "It will be observed that the torts which are covered by the descriptive epithets 'collateral' and 'casual' as used in the second form of statement, are identical with those which fall outside the scope of the exceptive clauses in the third." *Id.*, p. 624. "Ordinarily an independent contractor's casual tort, that is, his tort which is merely collateral to the prosecution of the work, is not one for which the employer can be held responsible." Note to *KAMP-MAN v. ROTHWELL* (1906, Tex.), 17 L. R. A. (N. S.), 758, citing a number of recent cases.

in this way, to cast off any of the absolute duties which the law puts upon him by virtue of his ownership of property.¹¹

It will be observed that hardly any two authorities agree on the enumeration or classification of the exceptions to the general rule that ordinarily an employer is not answerable for the acts of his independent contractor or of the latter's servants. Each enumeration is more or less complete and accurate, and each classification is more or less logical, but nevertheless arbitrary. The present writer has adopted a classification which appears to him better adapted to an exhaustive discussion of the subject at hand, and without attempting any complete enumeration, has divided the present phase of the general subject into three main sub-heads, namely: I. Exceptions depending on the character of the work undertaken. II. Exceptions depending on the character of the obligation owing by the employer. And, III. Exceptions determined by the conduct of the employer; and in this and the next three chapters these exceptions will be discussed in the order named.¹²

¹¹ Thomps. Neg., Sec. 651. The proprietor cannot relieve himself from the liability which the law imposes upon him where the work is wrongful *per se*, by any agreement which he may make with the undertaker of the work. *ELLIS v. SHEFFIELD, ETC., CO.* (1853), 2 El. & Bl. 967; *COLGROVE v. SMITH* (1894), 102 Cal. 220; 36 Pac. 411; 27 L. R. A. 590.

¹² For statements as to the exceptions to the general rule, see the following cases: *Birmingham v. McCary* (1887), 84 Ala. 469; 4 So. 630; *BERG v. PARSONS* (1898), 156 N. Y. 109; 50 N. E. 957; 66 Amer. St. Rep. 542; 41 L. R. A. 391; 41 Am. Neg. Rep. 432; *Burd.*

Cas. Torts, 406, note; *Water Co. v. Ware* (1872), 16 Wall. 566; *CLARK v. FRY* (1858), 8 Ohio St. 358; 72 Amer. Dec. 590; *Chicago v. Robbins* (1862), 2 Black (U. S.), 418; *Railroad Co. v. Hanning* (1872), 15 Wall. (U. S.), 649; 7 Am. Neg. Cas. 309; *CUFF v. NEWARK, ETC., RAILROAD* (1870), 35 N. J. Law, 17; 10 Amer. Rep. 205; 16 Am. Neg. Cas. 668, n. For further illustrations as to the liability of an owner or employer for the negligence of an independent contractor and his servants, see the cases cited in note 45, *Cooley on Torts*, Student's ed., p. 482. See, also, *ATLANTA, ETC., RAILROAD v. KIMBERLEY*

rule that one who employs another to do a piece of work is not liable for the other's collateral negligence, unless the relation of master and servant existed between them. The following exceptions to the general rule apply to and govern this case: (1) Whenever an injury to a third party results from the employer's failure to perform a duty which he owes to such party, he will not be permitted to avoid his liability by letting the performance of the work to another; (2) One who has a piece of work to perform, which, in its nature, is dangerous to others, is under obligation to see that it is carefully performed so as to avoid such injury, and he can not delegate the obligation to an independent contractor and thus avoid his liability in case the work is negligently done to another's injury."¹⁷

I. CHARACTER OF WORK.

Sec. 67. Contract Work a Nuisance.

A well-established exception to the general rule is that if the employer contracts for a nuisance or other unlawful

gerous but more expensive means than blasting. It was held that plaintiff could not recover as the injury could not reasonably have been anticipated and was entirely collateral to the work contracted for and not its probable consequence. *Symons v. Alleghany Co.* (1907), 105 Md. 254; 65 Atl. 1067. So, also, a railroad company will not be liable for the negligent performance of an act not necessary to the execution of the contract and not called for by it. *Chattahoochee, etc., Railroad v. Behrman* (1903), 136 Ala. 508;

35 So. 132. When a proprietor lets a contract for work on his property to an independent contractor and that contractor in performing the same commits torts which are not necessary to such performance, the owner is not liable therefor. *Murtfelt v. New York, etc., R.* (1886), 102 N. Y. 702; 25 Am. & Eng. R. Cas. 144.

¹⁷ *St. Louis, etc., R. v. Madden* (1908), 77 Kans. 80; 93 Pac. 586; 17 L. R. A. (N. S.), 788; 50 Am. & Eng. R. Cas. 48, syllabus by court, citing numerous cases.

liable; but if the injury directly results from the work which the contractor engaged and was authorized to do, he is equally liable with the contractor.¹⁵ When the main act is lawful, and the contractor incidentally commits an unlawful act, the employer is not liable.¹⁶ "It is a general

¹⁵ *Chicago v. Robbins* (1862), 2 Black (U. S.), 428; *Robbins v. Chicago* (1866), 4 Wall. (U. S.), 679; *Water Co. v. Ware* (1872), 16 Wall. (U. S.), 566, 576; *Hundhausen v. Bond* (1874), 36 Wisc. 29; *O'Rourke v. Hart* (1870), 7 Bosw. (N. Y.), 511; 9 Id. 301; *Earl v. Beadleston* (1877), 10 Jones & Sp. (N. Y.), 295; *DAVIE v. LEVY* (1887), 39 La. Ann. 551; 2 So. 395; 4 Amer. St. Rep. 225. Two recent cases well illustrate the distinction between "collateral" and "direct" negligence above referred to: *BOOVER v. WILBUR* (1900), 176 Mass. 482; 57 N. E. 1004; 8 Am. Neg. Rep. 246; 53 L. R. A. 172; *COVINGTON, ETC., Co. v. STEINBROCK* (1899), 61 Ohio St. 215; 55 N. E. 618; 7 Am. Neg. R. 154; 76 Amer. St. Rep. 375, and note thereto. See, also, *Kerr v. Atlantic, etc., Railroad* (1895), 25 Can. (S. C.), 197, cited in 65 L. R. A. 655.

¹⁶ *WILSON v. WHITE* (1883), 71 Ga. 506; 51 Amer. Rep. 269. Thus, if the plaintiff is not of right entitled to support for his house, and where the gravamen of the action is not the unlawfulness of the act itself, but the negligent manner of performing it, it seems on principle that the defendant's having let the work to an independent contractor skilled

in such business and of good repute, would exonerate the owner; for the negligence would not be his but would be that of the independent contractor and the latter would be liable. *Gayford v. Nichols* (1854), 9 Exch. 702. The proprietor was held liable where the independent contractor employed to construct the stonework, drew heavy loads of stone over the sidewalk in front of the premises so as to render the walk defective and unsafe and an injury to a pedestrian resulted therefrom. *Mullins v. Siegel, etc., Co.* (1904), 88 N. Y. Supp. 737. A proprietor was held not liable for the negligence of an independent contractor's servant in throwing a piece of lime in a mortar bed in the street, causing injury to a passerby, as the work itself was not a nuisance and the injury did not necessarily result therefrom. *Strauss v. Louisville* (1900), 108 Ky. 155; 55 S. W. 1075. A highway traveler was injured by a stone thrown from a blast in a quarry (about fifty yards from a highway) operated by a contractor in securing stone to improve defendant's highway under contract; it did not appear that defendant authorized or knew of such blasting; the stone might have been quarried by less dan

The owner can not, by any contract, relieve himself of duties resting upon him as owner of real estate, not to do or suffer to be done upon it that which will constitute a nuisance, and therefore an invasion of the rights of others.²¹ It is clear that where the creation of a nuisance is a direct and necessary incident of the stipulated work as a whole, the principal employer is liable.²²

(1887), 111 Ind. 195, 198; 12 N. E. 296; 60 Amer. Rep. 696; 31 Am. & Eng. R. Cas. 134 (rule so stated, but the proprietor was exonerated and the contractor held liable); *DAVIE v. LEVY* (1887), 39 La. Ann. 551; 2 So. 395; 4 Amer. St. 225.

²¹ *Chicago v. Robbins* (1862), 2 Black (U. S.), 418; *CLARK v. FRY* (1858), 8 Ohio St. 358; 72 Amer. Dec. 590; *Hughes v. Railroad Co.* (1883), 39 Ohio St. 461; 15 Am. & Eng. R. Cas. 100; *CURTIS v. KILEY* (1891), 153 Mass. 123; 26 N. E. 421; *Burd. Cas. Torts*, 403; *THOMAS v. HARRINGTON* (1903), 72 N. H. 45; 54 Atl. 285; 65 L. R. A. 742; 16 Am. Neg. R. 608, n.; *SOUTHERN OHIO RAILROAD v. MOREY* (1890), 47 Ohio St. 207; 24 N. E. 269; 7 L. R. A. 701; 43 Am. & Eng. Ry. Cas. 97; *HAWVER v. WHALEN* (1892), 49 Ohio St. 69; 29 N. E. 1049; 14 L. R. A. 828; *MCCARRIER v. HOLLISTER* (1902), 15 So. Dak. 366; 89 N. W. 862; 11 Am. Neg. R. 641; 91 Amer. St. Rep. 695; *Carlson v. Stocking* (1895), 91 Wisc. 432; 65 N. W. 58; *Holliday v. National Telegraph Co.* (1899), 2 Q. B. 392. See, also, *Dillon v. Hunt* (1891), 105 Mo. 154; 16 S. W. 516; 24 Amer. St. Rep. 374.

²² *Dressell v. Kingston* (1884), 32 Hun, 533; *Salves v. New City Gas Co.* (1879, Quebec), 2 L. N. S. C. 97 (horse fell into a pit excavated in the street of a city); *SEYMOUR v. CUMMINS* (1889), 119 Ind. 148; 21 N. E. 549; 52 L. R. A. 126; *Florsheim v. Dullaghan* (1895), 58 Ills. App. 593. See other cases cited in 65 L. R. A. 752. For Missouri cases on the question of the liability of one for a nuisance on his own premises, see *Dillon v. Hunt* (1881), 11 Mo. App. 246; s. c. (1882), 82 Mo. 150. The reasoning of the Court of Appeals is approved in *Dillon v. Hunt* (1891), 105 Mo. 154; 16 S. W. 516; 24 Amer. St. Rep. 374. Cf., *Perry v. Lord* (1885), 17 Mo. App. 212. The rule that one who employs another to commit a nuisance or a trespass must answer for it, although he exercises no control over that other as to the mode employed by him to reach the unlawful result, rests upon the idea that the employer becomes a co-trespasser by reason of trespassing or participating in the work that is done, and not on the doctrine of *respondeat superior*. *Kellogg v. Payne* (1886), 21 Iowa, 575, per Cole, J. In Maryland a proprietor was held

act, he remains liable to any person injured in consequence of the performance of the contract.¹⁸ For if the work contracted for is unlawful, as where it naturally constitutes or creates a nuisance, then the rule exempting the employer does not apply, but both the employer and the contractor are liable for injuries resulting therefrom.¹⁹ Judge Thompson lays down the rule thus: "If the work contracted for by the proprietor of the real property is wrongful *per se*, that is, if, in the ordinary mode of doing it, it will create a nuisance or if it involves a trespass upon another's property, the former proprietor will be liable for any injuries which may result from it to a third person, although the work is done by a person exercising an independent employment and employing his own servants."²⁰

¹⁸ *Ellis v. Sheffield Gas Co.* (1853), 2 El. & Bl. 767; *Deford v. State* (1863), 30 Md. 179; *KETCHAM v. NEWMAN* (1894), 141 N. Y. 205; 36 N. E. 197; 24 L. R. A. 102.

¹⁹ *Congreve v. Smith* (1853), 18 N. Y. 79; *Chase Cas. Torts*, 180; *Creed v. Hartman* (1864), 29 N. Y. 591; 86 Amer. Dec. 341. If the work contracted for creates a nuisance, the employer is answerable. *Burd. Torts*, 140, citing and quoting from *BERG v. PARSONS* (1898), 156 N. Y. 109, and citing *HOLE v. RAILWAY Co.* (1861), 6 H. & N. 488; *Deford v. State*, *supra*; *WOODMAN v. METROPOLITAN RAILWAY Co.* (1889), 149 Mass. 335; 21 N. E. 482; 4 L. R. A. 213; 14 Amer. St. Rep. 427; 12 Am. Neg. Cas. 80; 6 Rail. & Corp. L. J., 72; *THOMAS v. HARRINGTON* (1903), 72 N. H. 45; 54 Atl. 285; 65 L. R. A. 742; 16 Am. Neg. Rep. 608, n.

²⁰ *Thomp. Neg.*, p. 648; *Leber v. Minneapolis, etc., Railroad* (1882), 29 Minn. 256; 13 N. W. 31, a case of trespass; *Ellis v. Sheffield, etc., Co.* (1853), 2 El. & B. 766; *CUFF v. NEWARK, ETC., RAILROAD* (1870), 35 N. J. Law, 17, 574; 10 Amer. Rep. 205; 16 Am. Neg. Cas. 668, n.; *Kellogg v. Payne* (1866), 21 Iowa, 578; *Robbins v. Chicago* (1866), 4 Wall. (U. S.), 657; *Chicago v. Robbins* (1862), 2 Black (U. S.), 418; *WATER Co. v. WARE* (1872), 16 Wall. (U. S.), 566, 576; *HOLE v. SITTINGBOURNE, ETC., RAILROAD*, *supra*; *Hundhausen v. Bond* (1874), 36 Wisc. 29; *Lockwood v. New York* (1858), 2 Hilt. (N. Y.), 66; *KEEGAN v. WESTERN RAILROAD* (1853), 8 N. Y. 175; 59 Amer. Dec. 476; *CLARK v. FRY* (1858), 8 Ohio St. 358; 72 Amer. Dec. 590. Compare *Hill v. New River Co.* (1868), 9 B. & S. 303; *WABASH, ETC., RAILROAD v. FARVER*

Indiana case an action was held maintainable where the injury charged was that a drainage ditch obstructed the plaintiff's access to his own premises, that the soil of his lot fell into it, and that stagnant and filthy water was allowed to remain in it.²⁶

In the category of liability of an employer for injuries occasioned by the omission of some duty imposed on him, is the case of a continuing nuisance; for a man must not suffer a nuisance to continue on his premises, to the injury of others, although he was not responsible for its creation.²⁷ On the other hand, it has been held that a railroad company which has not accepted its road from an independent contractor for its construction at the time a third person received injuries from a nuisance can not be held to have ratified any act of the contractor by which the nuisance was

dent contractor. *Stevenson v. Wallace* (1876), 27 Gratt. (Va.), 77, 91; *Bower v. Peate* (1876), 1 Q. B. Div. 321; 11 Am. Neg. Rep. 645.

²⁶ *SEYMOUR V. CUMMINS* (1889), 119 Ind. 148; 21 N. E. 549; 5 L. R. A. 126. The plaintiff, a worker in marble, was held entitled to recover where his monuments were injured by large quantities of soot, etc., which collected on defendant's iron smoke stack and were blown on to the monuments on plaintiff's premises, and as the injury was the natural result of erecting such a smoke stack at that place, the defendant was not protected by its having been erected by an independent contractor. *Skelton v. Fenton, etc., Co.* (1894), 100 Mich. 87; 58 N. W. 609. The defendant city had made a contract with a party for removing carcasses of

animals dying or killed in its limits. On one occasion after many mules had been destroyed by a fire, the mayor, in order to obviate the nuisance which would have resulted from conveying them through the streets arranged with the contractor's servant to throw them in the river. The latter took a convenient road to the river and threw them in at a point temporarily overflowed and concealing plaintiff's quarry. The carcasses were not carried away but sank into the quarry, so that plaintiff could not reopen it. For the injury so caused, the city was held not answerable. That the act was negligent or the consequence proximate is not unquestionable. *HILSDORF V. ST. LOUIS* (1869), 45 Mo. 94; 100 Amer. Dec. 352.

²⁷ *Osborn v. Union Ferry Co.* (1869), 53 N. Y. 629; *Burgess v.*

Some decisions make a distinction between cases where the wrong done is something within the immediate control of the contractor or of his servants, and where it proceeds from something left by them in the street, in the nature of a public nuisance.²³ Numerous cases hold that a city is liable for injuries arising from dangerous nuisances in its streets, such as unguarded excavations, although the negligence is that of contractors of public work with the city.²⁴

It has been held in a leading Indiana case that it is not necessarily a nuisance to operate a portable steam engine, in a careful manner, in close proximity to a public highway; so that if it is operated negligently by an independent contractor, engaged in pumping water out of an excavation for a railroad company, whereby a traveler's horse is frightened, the company is not liable.²⁵ In another leading

not liable for the contractor's act on the principle of *respondeat superior*, yet if proof showed the building was so constructed as to constitute a nuisance, he would be liable; otherwise, if erected in an ordinarily substantial and secure manner and it was overthrown by extraordinary causes. *Deford v. State* (1863), 30 Md. 179.

²³ *BLUMB v. CITY OF KANSAS* (1884), 84 Mo. 112; 54 Amer. Rep. 87; *HERRINGTON v. LANSINGBURGH* (1888), 36 Hun (N. Y.), 598; 110 N. Y. 145; 17 N. E. 728; 10 Amer. St. Rep. 348. Cf., *Kelly v. Mayor* (1854), 11 N. Y. 433; *Pack v. Mayor* (1853), 8 N. Y. 222. *Contra*, *LOGANSFORD v. DICK* (1880), 70 Ind. 80; 36 Amer. Rep. 166.

²⁴ *Beatrice v. Reid* (1894), 41 Nebr. 214; 59 N. W. 770; *Haniford v. Kansas City* (1890), 103

Mo. 172; 15 S. W. 753; *Bauer v. Rochester* (1885), 59 Hun (N. Y.), 615; 12 N. Y. Supp. 418; *TURNER v. NEWBURGH* (1888), 109 N. Y. 301; 16 N. E. 344; 4 Amer. St. Rep. 453. (See other cases cited in Sec. 139, *et seq.*)

²⁵ *WABASH, ETC., RAILROAD v. FARVER* (1887), 111 Ind. 195; 12 N. E. 296; 60 Amer. Rep. 696; 31 Am. & Eng. R. Cas. 134. In a case where a plaintiff was entitled to support for his buildings as well as for his land, it was not a defense against liability for negligence in such an action, that the defendant contracted with an experienced and skillful excavator to do the work. These cases are referable to the class holding that where one does on his own land an act *per se* a nuisance he is answerable therefor although the work is done by an indepen-

that a few days before the accident such owner employed a carpenter, who was an independent contractor, to repair the door and the negligence of the latter contributed to the accident.³¹ And when a company, without the necessary municipal authority, employed a contractor to open trenches in the streets of a city and a person was injured by falling over a heap of stones left by the contractor, the company was liable for the contractor's unlawful act.³² Several rulings on this point have been made in New York. Thus, it is said, that persons who, without special authority, make or continue a covered excavation in a public street or highway, for a private purpose, should be responsible for all injuries to individuals resulting from the street or highway being thereby less safe for its appropriate use, in the absence of contributory negligence;³³ and again, if a per-

³¹ *BARRY v. TERKILDSSEN* (1887), 72 Cal. 254; 13 Pac. 657; 1 Amer. St. Rep. 55. Where a building is erected in a manner forbidden by ordinance or statute and, in consequence, it falls or collapses, the owner is liable for any damage or injury occasioned thereby; *Walker v. McMillan* (1882), 6 Can. S. C. R. 241; *Pitcher v. Lennon* (1886), 16 Misc. 609; 38 N. Y. Supp. 1007.

³² *Ellis v. Gas, etc., Co.* (1853), 23 L. J. Q. B. 42; 2 El. & Bl. 767. In an Australian case it was held that one who had contracted with a local council to make or repair a street, under conditions prohibiting subletting without its consent, and requiring obstructions to be fenced and lighted, was not liable to one injured by stumbling over rubbish unprotected by fence or light, although it was left there

by one to whom he had without consent sublet a part of the work; *Phillips v. Byrne* (1877), 3 Vict. L. R. 179. By an English act, commissioners appointed to improve a harbor, were empowered with the ballast board's sanction, to exhibit lights, etc., to guide ships navigating the harbor. The contractor employed to execute the work was held guilty of negligence is not obtaining such sanction to set up lights on the ends of piles during the progress of the operations, but the commissioners were held not liable for injury to a vessel due to want of such lights. This decision is of doubtful value on the second point. *Gilbert v. Halpin* (1858, Exch.), 3 Ir. Jur. (N. S.), 300; *Pigot, C. B.*, dissented.

³³ *Congreve v. Smith* (1858), 18 N. Y. 79; *Chase Cas.* 180.

created, in the absence of any evidence showing that it had knowledge thereof.²⁸ If the contractor is the author of the nuisance and is the primary wrong-doer, he will be liable in damages to the person injured in consequence of it, although the employing corporation may also be liable for a violation of its duty in suffering the nuisance to remain.²⁹

Sec. 68. Contract Work Unauthorized.

"Where the necessary authority to undertake the specified work has not been obtained, or where it can not be performed without violating an express legislative enactment, the mere fact that it is entrusted to an independent contractor will not relieve the person for whose benefit it is done from liability for such injuries as its execution may produce."³⁰ Thus it is asserted in a California case, that one who is injured by falling through a wooden trap door over an excavation in a sidewalk can, where such coverings are prohibited by an ordinance of the city, recover against the owner of adjoining premises, notwithstanding

Gray (1845), 1 C. B. 578; Matheny v. Wolffs (1865), 2 Duv. (Ky.), 137.

²⁸ ATLANTA, ETC., RAILROAD CO. v. KIMBERLY (1894), 87 Ga. 161; 13 S. E. 277; 27 Amer. St. Rep. 231.

²⁹ Howarth v. McGugan (1893), 25 Ont. 396; 47 Am. & Eng. Corp. Cas. 133. Cf., STEWART v. CALIFORNIA IMPROVEMENT CO. (1900), 131 Cal. 125; 61 Pac. 280; 52 L. R. A. 205; Burd. Cas. Torts, 412 (steam-roller negligently run, city held liable and contractor exempt.)

³⁰ Note to THOMAS v. HARRING-

TON (1903, 72 N. H. 45), in 65 L. R. A. 746, citing, *inter alia*, Shea v. River, etc., Board (1880), Ir. L. R., 6 C. L. 179. "It will be observed that, by changing the logical standpoint, the cases which have been made to turn upon this principle may, without difficulty, be brought within the purview of another principle, viz.: that a person who is subject to a statutory duty, must at his peril see that it is fulfilled, whether the work to which it is incident is or is not let out to an independent contractor." *Id.*, 748.

from responsibility.”³⁷ The question what kind of work is unlawful or wrongful *per se* within the rule which charges the proprietor for the injurious consequences of work being done by an independent contractor “would conduct us into an infinite variety of detail.”³⁸ It is clear that a proprietor who makes a contract for the doing of an act upon his land which will necessarily require the commission of a trespass upon the premises of an adjoining owner will become liable for such trespass, if committed, and it will be no defense that it was committed by an independent contractor.³⁹ It is obvious that where the work which the contractor engages to do is wrongful *per se*, the owner and the contractor will occupy the position of joint tort feasons, and the person damnified may recover against either or both.⁴⁰ Both the owner and the contractor will be liable where the act contracted to be done is itself wrongful.⁴¹ But where one

³⁷ Barrows on Neg., sec. 62 (black-letter), citing *Ellis v. Gas Co.*, *supra*; *Blessington v. City of Boston* (1891), 153 Mass. 409; 26 N. E. 1113; *STURGES v. SOCIETY* (1881), 130 Mass. 414; 39 Amer. Rep. 463; *CURTIS v. KILEY* (1891), 153 Mass. 123; 26 N. E. 421; *Burd. Cas.* 403; *WOODMAN v. METROPOLITAN RAILROAD Co.* (1889), 149 Mass. 335; 21 N. E. 486; 4 L. R. A. 213; 14 Amer. St. Rep. 427; 6 R. & Corp. L. J. 72; 12 Am. Neg. Cas. 80; *BABBAGE v. POWERS* (1891), 130 N. Y. 281; 29 N. E. 132; 14 L. R. A. 398.

³⁸ *Thomps. Neg.* 649. Frequent instances are presented in this and the next three chapters. In a recent leading case it is said that the construction of the brick work of a house abutting on a street is not regarded as an enterprise inherently dangerous to the users

of the street, so as to make the proprietor liable for the injuries to a pedestrian by the placing of a plank across the sidewalk for the use of laborers in carrying brick and mortar into the building; *RICHMOND v. SITTING* (1903), 101 Va. 354; 43 S. E. 562; 99 Amer. St. Rep. 879; 65 L. R. A. 445; 16 Am. Neg. R. 609, n.

³⁹ *Ketcham v. Cohn* (1893), 51 N. Y. St. R. 213; 22 N. Y. Supp. 181; *Waller v. Lasher* (1890), 37 Ills. App. 609; *Coleman v. State* (1892), 134 N. Y. 564; 31 N. E. 902.

⁴⁰ *Kollock v. Madison* (1893), 84 Wisc. 458; 54 N. W. 725.

⁴¹ *Murray v. Arthur* (1901), 98 Ills. App. 331; *Wilbur v. White* (1903), 98 Me. 191; 56 Atl. 567; 16 Am. Neg. R. 606, n.; *Crisler v. Ott* (1894), 72 Miss. 166; 16 So. 416.

son who is not authorized to excavate in a highway employs a contractor to do so, he is liable for injuries inflicted by the contractor in doing the work, though he would not be so liable if he had first obtained a license to excavate.³⁴ On the other hand, it has been held in New York lately that a contractor engaging to erect a building, does not become liable to a penalty imposed by a city ordinance prohibiting the deposit of the material in the street without a permit, because the ordinance has been violated by an independent subcontractor where the original contractor had no authority to direct him in the matter. Nor will the original contractor's failure to procure such permit make him liable where there is no necessity for depositing the material in the street, and he does not know that it will be done.³⁵

Sec. 69. Contract Work Unlawful, other than Nuisance.

An eminent author has declared that "it is at least true that where the contract calls for the doing of an act that is itself wrongful, the employer remains liable for all the consequences, practically as a joint tortfeasor with the contractor."³⁶ "When the thing contracted to be done is tortious or unlawful, merely doing it by another person, under any form of contract, will not relieve the employer

³⁴ *Creed v. Hartman* (1864), 29 N. Y. 591; 86 Amer. Dec. 341.

³⁵ *Buffalo v. Clement* (1892), 19 N. Y. Supp. 846.

³⁶ *Huff. Agcy.*, 2d ed., Sec. 220. Where work is contracted for is unlawful, the employer is liable; *Burd. Torts*, pp. 139-140, quoting *BERG v. PARSONS* (1898), 156 N. Y. 109, and citing *Ellis v. Sheffield*

Gas Co. (1853), 2 El. & B. 767; 23 L. J. Q. B. 42; *Spence v. Schultz* (1894), 103 Cal. 208; 37 Pac. 220; *McDonnell v. Rifle Room Co.* (1888), 71 Mich. 61; 38 N. W. 681; *Crisler v. Ott* (1894), 72 Miss. 166; 16 So. 416; *KETCHAM v. NEWMAN* (1894), 141 N. Y. 205, 209; 36 N. E. 197; 24 L. R. A. 102.

To establish the owner's liability on the ground that the injury complained of was the natural and probable consequence of the contract, "it is not enough to show that the employer supplied one or more of the instrumentalities which were necessary for the execution of the stipulated work. It does not follow that, because those instrumentalities were capable of being so used as to constitute a nuisance, or of being used in an improper, negligent or mischievous manner, an injury of which it is an efficient cause must therefore be regarded as a natural consequence of the permission to use it. The extent of the authority conferred by the employer is, to execute the contract by a proper and reasonable use of any means and appliances which he furnishes. . . . Nor can the liability of an employer, for the careless management of an appliance, be inferred from the mere fact that there was an understanding between him and the contractor that such an appliance was to be used." ⁴⁴

v. WISEMAN (1899), 89 Md. 12; 42 Atl. 918; 44 L. R. A. 482; *Burd. Cas. Torts*, 404; *Pye v. Faxon* (1892), 175 Mass. 185; 55 N. E. 894; 78 Amer. St. 486; *CARRICO v. WEST VIRGINIA, ETC., RAILROAD* (1891), 35 W. Va. 389; 14 S. E. 12; (1894), 39 W. Va. 86; 19 S. E. 571; 24 L. R. A. 50. "In other cases the interposition of an independent contractor has been held to be no protection to the defendant, for the reason that the stipulated work was to be executed on land owned or occupied by certain incidents which would be likely to produce injury to the adjoining premises, unless the appropriate precautions were taken. Thus, the plaintiff has

been allowed to recover where the work of making an excavation for a building was so negligently executed that a building on the adjoining premises was damaged by the withdrawal or weakening of its lateral support." Note to *JACOBS v. FULLER, ETC., Co.* (1902, Ohio), in 65 L. R. A. 848. One who employs a contractor to do a particular act is liable for the contractor's injurious acts "which flow out of the fulfillment of the contract." *Pitts v. Kingsbridge, etc., Board* (1871), 25 L. T. (N. S.), 195.

⁴⁴ Note to *SALLIOTTE v. KING, ETC., Co.* (1903), 58 C. C. A. 466; 122 Fed. 378, in 65 L. R. A. at p. 642, citing cases.

railroad contracted with another to construct its road and the latter unnecessarily erected an embankment, which flooded plaintiff's lot, the first railroad company was held not liable.⁴²

Sec. 70. Same, Calling for Injurious Result.

If the employer contracts for improper materials or an unsafe plan, or generally an unsafe result, he remains liable for damages occasioned thereby, although the work is done by an independent contractor.⁴³ "It is as sound a rule of law, as of morals, that when, in the natural course of things, injurious consequences will arise to another from an act which I cause to be done, unless means are adopted by which such consequences may be prevented, I am bound, so far as it lies in my power, to see to the doing of that which is necessary to prevent the mischief. Failure to do so would be culpable negligence on my part."^{43a} "One who causes work to be done is liable for the acts of employees of an independent contractor, where the resulting injury, instead of being collateral and flowing from the negligent act of the employee alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work if reasonable care was omitted in the course of the performance."^{43b}

⁴² *Chattahoochee, etc., R. v. Zeberman* (1903), 136 Ala. 132; 30 Am. & Eng. R. Cas. (N. S.), 929; 16 Amer. Neg. R. 101, n.

⁴³ *Huff, Agcy.*, 2d. ed., Sec. 221, citing *GORHAM v. GROSS* (1878), 125 Mass. 232; 28 Amer. Rep. 234.

^{43a} *Norwalk Gas Co. v. Norwalk* (1893), 63 Conn. 496, 528; 28 Atl. 32, per Fenn, J.

^{43b} *RAILROAD CO. v. MOREY* (1890), 47 Ohio St. 207; 24 N.

E. 269; 43 Am. & Eng. R. Cas. 97; 7 L. R. A. 701. To the same effect *DAVIE v. LEVY* (1887), 39 La. Ann. 551; 2 So. 395; *WERTHEIMER v. SAUNDEBS* (1897), 95 Wisc. 573; 37 L. R. A. 146; 70 N. W. 824. One can not escape liability by contracting for that the necessary or probable effect of which would be to injure others; *Evans v. Murphy* (1898), 87 Md. 498; 40 Atl. 109; *BONAPARTE*

that a city is responsible to property owners for unnecessary injury to their property in making local improvements where the work is done by contractors; and it is held that the contractors are not liable when they do the work properly and in accordance with the plans and specifications. In the particular case the injury consisted in so grading a street as to change the flow of the surface water. This decision is questioned.⁴⁹ The proprietor has been held liable for injuries due to the obstruction of a street, which was a direct and necessary incident of the work.⁵⁰

A complaint against an employer is demurrable if the allegations show that the injury complained of was caused by the negligent manner in which the contractor executed the work in question, unless some allegation also shows a misfeasance or malfeasance on the employer's part which caused the contractor to do the work negligently, and that

Amer. Dec. 753; *PALMER v. LINCOLN* (1876), 5 Nebr. 137; 25 Amer. Rep. 470; *BUFFALO v. HOLLOWAY* (1852), 7 N. Y. 493; 57 Amer. Dec. 530; *Lockwood v. New York* (1858), 2 Hilt. (N. Y.), 66; *STORRS v. UTICA* (1858), 17 N. Y. 104; 72 Amer. Dec. 437; *CLARK v. FRY* (1858), 8 Ohio St. 379; 72 Amer. Dec. 590. Here as elsewhere the employer will be liable for injuries which proceed from the nature of the work itself, and not from the manner in which the contractor executed it; *Ray v. Poplar Bluff* (1897), 70 Mo. App. 252, failure of the contractor to guard an opening in a bridge; *Penny v. Wimbledon, etc., Council* (1899), 2 Q. B. 72; 7 Am. Neg. R. 158, n., failure to safeguard street excavation.

⁴⁹ *Pearson v. Zable* (1879), 78

Ky. 170. In 5 Thomps. Neg., 289, it is said: "Clearly they are joint tort-feasors." Where a bridge built for a city by a contractor fell, causing damage and a jury found that it fell in consequence of "defect and inartificiality in the plan" of it, "as furnished by the city engineer," the city was held liable. *Dayton v. Pease* (—), 8 Ohio St. 80.

⁵⁰ *Johnston v. Phoenix, etc., Co.* (1901), 169 N. Y. 581; 62 N. E. 1096. To render an employer liable for injuries to a third person during the performance of a contract by an independent contractor, the injury must have arisen not from the work being done, but from the method adopted in doing it; *Sullivan v. Durham* (1898), 35 App Div. (N. Y.), 342; 54 N. Y. Supp. 962.

If the contract in its purview contemplates an act necessarily injurious to the rights or property of another, the contractee is liable for resulting damage; as where a canal company contracted for the repair of its canal with soil to be taken from certain land belonging to another, the removal of which was of necessity injurious to such other's property;⁴⁵ and where a contract stipulates for the erection of a wall of insufficient thickness in consequence of which it falls, the proprietor must pay the damages;⁴⁶ so also, if the plans are defective or the materials directed to be used are unsuited, the owner will be liable for damage or injury occasioned thereby.⁴⁷ If the acts done by the contractor and causing the injury were done in pursuance of the contract itself, or otherwise under the direction of a city, the city will be liable.⁴⁸ It is said, in a Kentucky case,

⁴⁵ *WILLIAMS v. IRRIGATION CO.* (1892), 96 Cal. 15; 30 Pac. 961; 31 Amer. St. Rep. 172; *Crenshaw v. Ullman* (1893), 113 Mo. 633; 20 S. W. 1077.

⁴⁶ *Treadwell v. New York* (1861), 1 Daly (N. Y.), 128.

⁴⁷ *MEIER v. MORGAN* (1892), 82 Wisc. 289; 52 N. W. 174; 33 Amer. St. Rep. 39. If an excavation result in a trespass upon adjacent property, in consequence of the work being done in conformity with the plans furnished by the proprietor, he will be responsible, although the work was done by an independent contractor; *Mamer v. Lussem* (1872), 65 Ills. 484. Where an employe of a person hired to build a water tank was injured by its bursting during a test because of defective rivet bolts, and it was shown that the owner's engineer was respon-

sible for the substitution of an insufficient method of making these holes, instead of having them drilled as required by the plans prepared by the owner, the employer was held liable; *Duerr v. Consolidated Gas Co.* (1903), 83 N. Y. Supp. 714.

⁴⁸ *Nevins v. Peoria* (1866), 41 Ills. 515; *Robbins v. Chicago* (1866), 4 Wall. (U. S.), 657, 679; 2 Black (U. S.), 418; Cf., also, *ELLIS v. GAS CO.* (1853), 2 El. & Bl. 767; *HOLE v. SITTINGBOURNE, ETC., RAILROAD* (1861), 6 Hurl. & N. 497; 7 Am. Neg. R. 157, n.; 8 Id. 301, n.; *Newton v. Ellis* (1885), 5 El. & Bl. 115; *SCAMMON v. CHICAGO* (1861), 25 Ills. 424; 79 Amer. Dec. 334; 14 Am. Neg. Cas. 418, n.; *LOWELL v. BOSTON, ETC., RAILROAD* (1839), 23 Pick. 24; 34 Amer. Dec. 33; *ST. PAUL v. SEITZ* (1859), 3 Minn. 297; 73

not liable where a contractor for the work of diverting a creek erected an embankment so defectively that it could not resist the action of the water which it was intended to confine.⁵⁶

Sec. 72. Work Dangerous per se; General Rule.

"The general rule is, that an employer is not liable for an injury caused by the negligence or wrongful act of an independent contractor in executing the work in compliance with his contract; but this rule does not apply when the contract requires the performance of work intrinsically dangerous."⁵⁷ Where the contract calls for the performance of work intrinsically dangerous, although in such cases the thing to be done may be lawful, it is none the less opposed to the spirit and policy of the law to permit the person who has assumed the imposed duty to escape liability by shifting it to a contractor.⁵⁸ In several English cases it is held that if, according to previous knowledge and experience, the work which the proprietor engages the contractor to do is inherently dangerous to third persons, and likely to lead to mischief, however carefully performed, it will be incumbent upon him to foresee such mischief and

⁵⁶ ALLEN v. HAYWARD (1845), 7 Q. B. 960; 4 Eng. Ry. & C. Cas. 104. Where a floor fell in consequence of its being overloaded, the owner of the premises was held not liable; Dillon v. Sixth Avenue Railroad (1884), 97 N. Y. 627. See, also, Hale v. Johnson (1875), 80 Ills. 185; 14 Am. Neg. Cas. 417, n., wall fell.

⁵⁷ ANDERSON v. FLEMING (1903), 160 Ind. 597; 67 N. E. 443; 66 L. R. A. 119; 16 Am. Neg. R. 606,

citing numerous authorities, including GODDARD v. HARPSWELL (1892), 83 Me. 499; 24 Atl. 956; 30 Amer. St. 411. An exception to the rule of non-liability for the acts of an independent contractor exists where the work is necessarily dangerous, unless certain precautions are taken; Montgomery St. R. v. Smith (1905), 146 Ala. 316; 39 So. 75; 42 Am. & Eng. R. Cas. (N. S.), 131.

⁵⁸ Barrows Neg., p. 165.

the origin of the injury complained of, therefore, be traced to the action of the former in setting in motion the immediately efficient cause of the wrong.⁵¹

Sec. 71. Same, Result Unforeseen.

The liability of the employer set out in the last preceding section is predicated upon the principle that one is liable for the proximate, natural and probable consequences of his own act. Hence, if there was no primary culpability in a given instance and the injury complained of resulted as a remote, unforeseen consequence, under the general principles of ordinary care, then the employer is not answerable; and likewise, if the independent contractor or his servant is not guilty of negligence in the premises, the contractor is not liable. Thus, where a person employs a competent architect and contractor and the plans are sufficient and approved by the building department of the municipality, the owner is not liable for an accident which happens by reason of the foreman of the contractor putting the foundation of a column on disturbed earth.⁵² It has been held that where the injury was caused by "the manner in which the contractor managed the details of the work," the employer is not liable;⁵³ nor is he liable for "a wrongful act unnecessarily done" by the contractor in the performance of his work;⁵⁴ nor for an act which did "not necessarily arise" out of the work contracted for.⁵⁵ The employer, it was held in an early leading English case, is

⁵¹ *White v. New York* (1897), 15 App. Div. (N. Y.), 440; 44 N. Y. Supp. 454. Cf. *Boardman v. Creighton* (1901), 95 Me. 154; 49 Atl. 663.

⁵² *Burke v. Ireland* (1901), 166 N. Y. 305; 59 N. E. 914.

⁵³ *Hauser v. Metropolitan Street*

Railroad Co. (1899), 58 N. Y. Supp. 286. To the same effect, *Shute v. Princeton* (1894), 58 Minn. 337; 59 N. W. 1050.

⁵⁴ *Upton v. Townsend* (1855), 17 C. B. 30, 71.

⁵⁵ *Chicago, etc., Railroad v. Hennessey* (1884), 16 Ills. App. 153.

no matter how careful or skillful the independent contractor may be.⁶⁰ The proprietor is liable, on the principle of being answerable for his own negligence, where the injury proceeds from the nature of the work itself, and not from the manner in which the independent contractor has executed it. If from any reason the nature of the work is such that, when done in the ordinary mode, it is necessarily or naturally injurious, in a legal sense, to a third person, the proprietor must answer to him in damages for it.⁶¹

⁶⁰ *SALISBURY v. ERIE RAILWAY* (1901), 66 N. J. L. 233; 50 Atl 117; 88 Amer. St. Rep. 480; 55 L. R. A. 578.

⁶¹ *WILLIAMS v. FRESNO, ETC., Co.* (1892), 96 Cal. 14; 31 Amer. St. Rep. 172; 30 Pac. 961; *Carlson v. Stocking* (1895), 91 Wisc. 432; 65 N. W. 58. The proprietor will not be absolved from liability for the negligence of an independent contractor where the work is, in itself, dangerous and likely to lead to mischief; *Toledo, etc., Co. v. Bosch* (1900), 101 Fed. 530; *Sullivan v. Durham* (1898), 54 N. Y. Supp. 962, blasting; *Penny v. Wimbledon, etc., Council* (1898), 2 Q. B. 72; 7 Am. Neg. R. 158, n. Where the work contracted for is intrinsically dangerous, the employer is held liable; *JOLIET v. HARWOOD* (1877), 86 Ills. 110; 29 Amer. Rep. 17; *Madigan v. Wellington, etc., Railroad* (1883), N. Zeal. L. R. 2 S. C. 209; *Bossence v. Kilmore* (1883), 9 Vict. L. R. 35, "dangerous in itself;" *Angus v. Dalton* (1878), L. R. 4 Q. B. D. 162, 187. If

the act contracted to be done was intrinsically dangerous, a city will be liable; *Joliet v. Seward* (1877), 86 Ills. 402, blasting rocks; *Marsh v. Philadelphia* (1894), 8 Pa. Dist. Rep. 340, excavating for a subway in a street and proceeding with the work so carelessly that a house abutting on the street falls into the excavation and is destroyed. In an action for damages for personal injuries resulting from an independent contractor's blasting, it was held that the plaintiff must show, *inter alia*, that the contractor was employed in a work which necessarily required blasting with explosives in the heart of the city, that no provision was made in the contract for observing proper precautions, and that the independent contractor did the work without taking proper precautions, so negligently that the plaintiff as a result was injured; *Huntt v. McNamee* (1900), 72 C. C. A. 441; 141 Fed. 293. "It can not be successfully maintained that building a house on a lot abutting

to take precautions against it.⁵⁹ Where the law, statutory or common, imposes a special duty upon the owner of highly dangerous things to see that they are properly used, the employer is liable, if such precautions are not taken,

- ⁵⁹ *Daniel v. Metropolitan Railroad Co.* (1871), L. R.; 5 H. L. 63, per Colonsay, J.; *Bower v. Peate* (1876), 1 Q. B. D. 321; 11 Am. Neg. Rep. 645; *Pickard v. Smith* (1861), 10 C. B. (N. S.), 470; 7 Am. Neg. R. 158, n.; 8 Id. 264, n.; Cf., *Pearson v. Cox* (1877), 2 C. P. Div. 369. See, also, the following American cases: *Norwalk Gas Co. v. Norwalk* (1892), 63 Conn. 495; 28 Atl. 32; *Colgrove v. Smith* (1894), 102 Cal. 220; 33 Pac. 115; 27 L. R. A. 590; *Chicago, etc., Co. v. Meyers* (1897), 168 Ills. 139; 48 N. E. 66; *JEFFERSON v. CHAPMAN* (1889), 127 Ills. 438; 20 N. E. 33; 11 Amer. St. Rep. 139; *Fitzpatrick v. Chicago, etc., Railroad* (1888), 31 Ills. App. 649. If the work to be executed is extra-hazardous, and such that in the natural course of things injurious consequences are likely to ensue, unless suitable means are adopted to prevent such consequences, the employer is liable unless he uses due care in the adoption of such means; Huff. Agcy., 2d. ed. sec. 224; *Bower v. Peate* (1876), L. R. 1 Q. B. D. 321; 45 L. J. Q. B. 446; *Black v. Christ Church Finance Co.* (1894), A. C. 48; 7 Am. Neg. R. 158, n.; *THOMPSON v. LOWELL, etc., RAILROAD* (1898), 170 Mass. 577; 49 N. E. 386; 40 L. R. A. 345; 64 Amer. St. Rep. 323; *Cameron v. Oberlin* (1897), 19 Ind. App. 142; 48 N. E. 386; *Norwalk Gas Co. v. Norwalk* (1893), 63 Conn. 495; 28 Atl. 321; *BONAPARTE v. WISEMAN* (1899), 89 Md. 12; 42 Atl. 918; 44 L. R. A. 482; *Burd. Cas. Torts*, 404; *COVINGTON, etc., BRIDGE Co. v. STEINBROCK* (1899), 61 Ohio St. 215; 55 N. E. 618; 7 Am. Neg. R. 154; 76 Amer. St. Rep. 575; *WETHERBEE v. PARTRIDGE* (1899), 175 Mass. 185; 55 N. E. 894; 78 Amer. St. Rep. 486. See, also, *Hale Torts*, 136; *Brown v. McLeish* (1887), 71 Iowa 381; 32 N. W. 385. "It has never been supposed that cutting down one's own trees in a forest was so intrinsically and essentially dangerous as to impose on the owner of the land or the trees the absolute duty of looking out for persons who might be passing along a private footpath." *YOUNG v. FOSBURG, etc., Co.* (1908, N. C.), 60 S. E. 654. "With the exception of the *Young* case, *Knowlton v. Hoit* (1891), 67 N. H. 155; 30 Atl. 346, set out in that case, is apparently the only case wherein this question is discussed; *Anderson v. Tug River, etc., Co.* (1906), 59 W. Va. 301; 53 S. E. 713, may, however, be referred to." Note to *Young* case, 16 L. R. A. (N. S.), 255.

Judge Thompson says on this point:⁶⁴ "If we pause to consider the effect of the decisions which affirm the liability of the proprietor (for the violation of a statutory duty), we shall see that they go far toward bringing us back to the doctrine of *BUSH v. STEINMAN*.⁶⁵ There is no solid distinction between one's obligation to perform a duty imposed on him by statute and a duty imposed by common law. To obstruct the street in front of my premises is a nuisance at common law, and the wrongfulness of the act is not augmented because it is prohibited by statute; such a statute is merely declaratory of the common law. If this act is committed by a contractor doing a job of work for me, it is difficult to see upon what grounds I should be held liable where the act is prohibited by statute, as in *GRAY v. PULLEN*,⁶⁶ and not liable where the act is merely a nuisance at common law, as in many cases which overrule *BUSH v. STEINMAN*.⁶⁷ In a very able judgment⁶⁸ Lord Cockburn appealed to *GRAY v. PULLEN* for the doctrine that where one causes an act from which danger may arise to others, he must see to it that others are not thereby injured, and that he can not divest himself of this liability by transferring it to an independent contractor, and that eminent judge declared that 'It can make no difference in point of principle whether the obligation was imposed by statute or existed at common law.' "

⁶⁴ Thomps. Neg., Sec. 668, p. 609.

⁶⁵ (1799), 1 Bos. & Pull. 404.

⁶⁶ (1864), 5 Best & S. 970; 7 Am. Neg. R. 158, n.

⁶⁷ *Supra*, n. 65.

⁶⁸ *Bower v. Peake* (1876), 1 Q. B. D. 321, 328; 11 Am. Neg. R. 645. On facts similar to *Gray v. Pullen*, *supra*, but where there was no duty imposed by statute, a differ-

ent result was reached; *Sadler v. Henlock* (1855), 4 El. & Bl. 570, commenting on which, Judge Thompson says (Neg. sec. 667, note 93): "But it is difficult to distinguish between a liability imposed by statute and one subsisting at common law, particularly as the statute is only declaratory of the common law."

"It is sufficiently manifest that the virtual abrogation now under discussion (*i. e.*, employers' non-liability for an independent contractor's torts) would result if the law were to predicate, in respect to all kinds of work indifferently, the existence of an absolute duty on the employer's part to guard against accidents, probable as well as improbable, that may happen to the damage of third persons while that work is being performed by an independent contractor."⁶² "If, therefore, recovery is sought on the ground that the employer ought to have adopted certain precautionary measures for the purpose of preventing the injury complained of, the action will fail, unless the plaintiff can at least show that, in view of the nature of the work and the conditions under which it was to be executed, the defendant should have foreseen that the actual catastrophe which occurred was likely to happen if those precautionary measures were omitted. Whether the production of evidence to this effect will entitle him to go to the jury upon the question whether the employer ought to have provided for the protection of the public" is a point which has "elicited different opinions. . . . But it seems to be a reasonable inference from the more recent decisions * * * that this point should be decided in plaintiff's favor."⁶³

upon a street is inherently and necessarily dangerous, or that danger and hazard must necessarily attend its erection. It is a lawful work and of necessity engaged in by thousands every day, and if carefully and properly done, involves no danger to any one." *RICHMOND V. SITTERDING* (1903), 101 Va. 354; 43 S. E. 562; 99 Am. St. Rep. 879; 16 Am. Neg. R. 609, n.; 65 L. R. A. 445, citing cases.

⁶² Note to *SALLIOTTE V. KING, ETC., Co.* (1903), 58 C. C. A. 466; 122 Fed. 378, in 65 L. R. A. at p. 639, citing *CITY, ETC., RAILROAD V. MOORES* (1894), 80 Md. 348; 30 Atl. 643; 45 Amer. St. Rep. 345.

⁶³ Note to *SALLIOTTE V. KING, ETC., supra*, citing *Pearson v. Cox* (1877), L. R. 2 C. P. Div. 369; *JACOBS V. FULLER, ETC., Co.* (1902), 67 Ohio St. 70; 65 L. R. A. 833; 13 Am. Neg. R. 208; 16 Id. 611, n.

what time the accident happened, whether before, after or during the work, if otherwise the employer is liable.⁷²

Sec. 73. Same, **Blasting.**

It is desirable to notice separately those cases which relate to injuries caused by blasting operations, for the reason that the doctrine that the employer is exempt from liability under such circumstances is not accepted by all the authorities.⁷³ One author asserts that blasting with dynamite is considered by most courts so dangerous an undertaking as to impose upon the landowner or employer the non-assignable duty of seeing that the work is carefully conducted.⁷⁴ On the other hand, it has been declared, and supported by an array of decisions, that "by the weight of authority it seems that he (the employer) is not liable, although the work to be done is intrinsically dangerous, so long as no negligence can be imputed to him in employing such contractor, and the work itself be lawful, and will not necessarily result in injury to another."⁷⁵

Rep. 267; *Butler v. Hunter* (1862), 7 Hurl. & N. 826; 8 Am. Neg. R. 301, n.

⁷² Piggott on Torts, 96. Cf., *Khron v. Brock* (1887), 144 Mass. 516; 11 N. E. 748.

⁷³ Note to *SALLIOTTE v. KING, ETC. Co.* (1903), 58 C. C. A. 466; 122 Fed. 378, in 65 L. R. A., at p. 644.

⁷⁴ Burd. Torts, p. 143, citing *Norwalk Gaslight Co. v. Borough of Norwalk* (1893), 63 Conn. 495; 28 Atl. 32; *JOLIET v. HARWOOD* (1877), 86 Ills. 110; 29 Amer. Rep. 17; dissenting opinion of Dwight, C., in *MCCAFFERTY v. SPUYTEN DUYVIL, ETC., RAILROAD* (1874), 61 N. Y. 178, 185; 19 Amer. Rep. 267. The prevailing

opinion in *MCCAFFERTY v. SPUYTEN, ETC., R. Co.*, *supra*, was expressly disapproved in *WETHERBEE v. PARTRIDGE* (1899), 175 Mass. 185; 53 N. E. 894; 78 Amer. St. 486. Cf., also, *Murphy v. Lowell* (—), 124 Mass. 564; *Tiffin v. McCormack* (—), 34 Ohio St. 638; 32 Amer. Rep. 408; *Water Co. v. Ware* (1872), 16 Wall. (U. S.), 566.

⁷⁵ Article on "Explosives," by Mr. F. E. Jennings in 19 Cyc. 9. For an exhaustive discussion regarding "Liability for injury to person or property from concussion caused by blasting," see note to *BESSEMER, ETC., Co. v. DOAK* (1907, Ala.), 44 So. 627; 12 L. R. A. (N. S.), 389.

As to what work is intrinsically dangerous, this is a question which has proved troublesome even for the courts which recognize and enforce the distinction taken between collateral and direct negligence.⁶⁹ This exception of liability for extra hazardous work has not met with universal favor. It has been applied to numerous cases of excavating lands and endangering the support of adjoining property, to an exhibition of marksmanship, to the clearing of land by fire, to the removal of dangerous walls, and to blasting. On the other hand, some courts refuse to consider dynamite blasting, excavating, trench digging, etc., so dangerous as to be non-assignable unless the work is unlawful, or a nuisance, or the duty is imposed by statutes.⁷⁰ When the work to be done is itself lawful and is likely to be attended with injurious consequences, it is manifestly difficult to draw a clear line of distinction, or formulate a general rule determining just what degree of danger is necessary to place the responsibility on the employer. It would seem, however, that if the contemplated work is of such a nature that in the exercise of ordinary care it could be done with safety, although, in the absence of such care, it would be attended with danger, and probable injury, to third persons, the contractor alone would be responsible.⁷¹ It is immaterial

⁶⁹ See *ante*, sec. 66.

⁷⁰ *MYER v. HOBBS* (1876), 57 Ala. 175; 29 Amer. Rep. 719; *Mayor, etc., v. McCarty* (1887), 84 Ala. 469; 4 So. 630; *SCAMMON v. CHICAGO* (1861), 25 Ills. 424; 79 Amer. Dec. 334; 14 Am. Neg. Cas. 418, n.; *Kepperly v. Ramsden* (1876), 83 Ills. 354; *Tibbetts v. Knox, etc., Railroad* (1873), 62 Me. 437; *BLUMB v. CITY OF KANSAS* (1884), 84 Mo. 112; 54 Amer. Rep. 87; *CUFF v. NEWARK, ETC., RAILROAD* (1870), 35 N. J. L. 17;

10 Amer. Rep. 205; 16 Am. Neg. Cas. 668, n.; *BLAKE v. FERRIS* (1851), 5 N. Y. 48; 55 Amer. Dec. 304; *HACKETT v. WESTERN UNION TELEGRAPH Co.* (1891), 80 Wisc. 187; 49 N. W. 822; 10 Rail. & C. L. J. 390.

⁷¹ *Barrows on Neg.*, p. 166, citing *ENGEL v. EUREKA CLUB* (1893), 137 N. Y. 100; 32 N. E. 1052; 33 Amer. St. Rep. 695; *Connors v. Hennessey* (1873), 112 Mass. 96; *MCCAFFERTY v. RAILROAD Co.* (1874), 61 N. Y. 178; 19 Amer.

ing contemplates blasting in close proximity to adjoining buildings, the work is intrinsically dangerous, and the ordinary rule of independent contractor does not apply.⁷⁸ Thus, blasting of necessity involves danger to all who are in the immediate vicinity, and when the owner of premises within the city employs a contractor to do work thereon, which necessitates blasting, he is liable for injuries caused thereby to a third person.⁷⁹

The doctrine of liability for extra hazardous work has, as already stated, often been rejected in the case of a contract for blasting.⁸⁰ Where the situation is such that the blasting will not be dangerous to persons in the vicinity, provided the contractor gives timely notice of the explosion of each blast, and if a person is injured by such an explosion through the contractor's failure to give such notice, then if any liability arises it will be that of contractor and not that of the city or village; since the injury arises from the manner of doing the work and through a failure of duty on the contractor's part and not that of the municipality.⁸¹

⁷⁸ WETHERBEE v. PARTRIDGE (1899), 175 Mass. 185; 55 N. E. 894; 78 Amer. St. Rep. 486; Brannock v. Elmore (1892), 114 Mo. 55; 21 S. W. 451. Cf., Carmen v. Steubenville, etc., Railroad (1854), 4 Ohio St. 399. *Contra*, in New York; see notes 80 *et seq.*

⁷⁹ JAMES' ADMINISTRATOR v. MC-MINIMY (1892), 93 Ky. 471; 20 S. W. 435; 40 Amer. St. 200; 15 Am. Neg. Cas. 233, n. See, also, Georgia Central Railroad v. Bernstein, 113 Ga. 175; 38 S. E. 394. Compare, *contra*, Holland, etc., Co. v. Baird, 169 N. Y. 136; 62 N. E. 149, reversing 63 N. Y. Supp. 73.

⁸⁰ BERG v. PARSONS (1898), 156 N. Y. 109; 50 N. E. 957; 41 L.

R. A. 391; 66 Amer. St. Rep. 542; 47 Cent. L. J. 237; 4 Am. Neg. R. 432; Burd. Cas. 406, note. See McNamee v. Hunt (1898), 87 Fed. Rep. 298; Carter v. Berlin Mills (1876), 58 N. H. 52; 42 Amer. Rep. 572; Cuff v. Newark, etc., Railroad (1870), 35 N. J. L. 17; 10 Amer. Rep. 205; 16 Am. Neg. Cas. 668, n. In BERG v. PARSONS, *supra*, three judges (Gray, Bartlett and Haight) dissented on the ground that there was evidence justifying the conclusion that the employer was culpable in engaging an incompetent contractor.

⁸¹ HERRINGTON v. LANSINGBURGH (1886), 110 N. Y. 145; 17 N. E. 728; 6 Amer. St. Rep. 348.

In Vermont a railroad company was held liable for its failure to remove rocks thrown upon land adjoining the right of way as a result of blasting operations conducted by a contractor.⁷⁶ Where a city contracted in writing with A. for the erection of waterworks, which contract was assigned to B., and by him to C., and C.'s employees negligently caused the death of X., while such employees were engaged in blasting in trenches in the streets for water pipes, the city was held liable, though it had reserved no control over the work or over C.'s employees.⁷⁷ Some cases hold that where a contract for the erection of a build-

⁷⁶ *Sabin v. Vermont, etc., Railroad* (1853), 25 Vt. 363; but defendants did not raise the point of independent contractors. Other cases in note 65 L. R. A. 753.

⁷⁷ *LOGANSPORT v. DICK* (1880), 70 Ind. 65; 36 Amer. Rep. 166. But see *Stalder v. Huntington* (1899), 153 Ind. 354; 55 N. E. 88; *Schnurr v. Board, etc., Huntington Co.* (1899), 22 Ind. App. 188; 53 N. E. 425. If a person contracts with a municipal corporation to do a job of blasting rock, or to perform any other work which is inherently dangerous to others, he will not be relieved from liability to a person injured thereby from the fact that he sublet the contract to another by whose negligence the injury actually occurred, for in such case the proprietor himself would be liable; *Buddin v. Fortunato* (1890), 10 N. Y. Supp. 115. If the proximity of other persons, or the situation of their property with reference to the work, is such that blasting cannot be carried on at

all without subjecting such persons or such property to unreasonable risks, then the doing of it is a nuisance *per se* or negligence *per se*, at least in such sense as makes the proprietor an insurer against any injurious consequences which may flow from it and obliges him to pay damages, if damages accrue. In such case it will be no defense to him whatever that he has committed the work of blasting to an independent contractor; in other words, that he has hired some one else to do an act which is inherently mischievous and dangerous to others; *Brennan v. Schreiner* (1892), 8 Abb. (N. C., N. Y.), 481; 20 N. Y. Supp. 130. Most of the New York cases hold differently; see notes 80 *et seq.* See on the subject of "blasting," in general, the leading case of *KLEPSCH v. DONALD* (1892), 4 Wash. 436; 30 Pac. 991; 31 Amer. St. Rep. 936; 8 Wash. 162; 35 Pac. 621.

liability, it is said to be clear that cases in which a contract is entered into for the performance of work by means of blasting must stand outside the category of those in which the employer is held responsible on the ground that he contracted for work which was "intrinsically dangerous."⁸³ A constitutional provision, imposing on corporations, exercising eminent domain, a liability for consequential damages caused by taking property, was held not to render a railway corporation exercising such power liable for damages caused by a contractor's negligence in blasting rocks so as to throw them on property adjacent to its right of way.⁸⁴ Recovery was denied in a case where the plaintiff was injured by a rock thrown out by a blast set off while the foundation for a house was being excavated by a contractor.⁸⁵ In a recent California case, it is stated that the rule that one employing an independent contractor is not liable for the latter's negligence can not be modified by the doctrine that the employer is liable if the work is such as would necessarily produce wrongful consequences without reference to the negligence of the contractor, or is such as

work blasting was done. In *Hill v. Schneider*, *supra*, the New York supreme court held that a preliminary injunction will not lie at a tenant's instance to restrain his landlord from blasting in an adjoining piece of land, it appearing that he personally has not engaged in blasting, but has employed an independent contractor to accomplish a certain result, not wrongful *per se*, reserving to himself no control over the manner of doing the work; the decision proceeds on the ground that the work was not apparently such as might injure plaintiff *pendente lite*.

⁸³ *Schnurr v. Huntington Co.* (1899), 22 Ind. App 188; 53 N. E. 425, in which a county board, with the city's consent, let a contract to construct a sewer from the court house to the city's sewer; the city, the individual members of the board and the board, collectively, were held not answerable. See, also, *Blumb v. City, etc.* (1884), 84 Mo. 112; 54 Amer. Rep. 87.

⁸⁴ *Edmundson v. Pittsburgh, etc., Railroad* (1885), 111 Pa. St. 316; 2 Atl. 404. Cf., *Ardesco Oil Co. v. Gilson* (1870), 63 Pa. St. 146.

⁸⁵ *Hunt v. Vanderbilt* (1894), 115 N. C. 559; 20 S. E. 168.

If, however, the situation of the premises on which the blasting is done, with reference to the lawful proximity of third persons or with reference to adjacent property, is such that the blasting can be carried on without subjecting such persons or property to unreasonable risks, provided it is properly done(*i. e.*, that explosives of excessive force are not used, blasts are properly covered, proper warnings are given, and, if necessary, barriers are erected to arrest flying missiles) then it becomes the duty of the independent contractor to take these precautions, and if damages ensue from the neglect of them, he and not the proprietor will be liable.⁸² If full effect be given to the principle of non-

⁸² French v. Vix (1894), 143 N. Y. 90; 37 N. E. 612, reversing 30 Abb. (N. C.), 158; 21 N. Y. Supp. 1016; BOOTH v. ROME, ETC., RAILROAD (1893), 140 N. Y. 267; 35 N. E. 24; 24 L. R. A. 105; 37 Amer. St. Rep. 552; Burd. C. Torts, 717, reversing 17 N. Y. Supp. 336; 63 Hun 624. The earlier New York doctrine was different, as see HAY v. COHOES Co. (1849), 2 N. Y. 159; 51 Amer. Dec. 279; TREMAIN v. COHOES Co. (1849), 2 N. Y. 163; 51 Amer. Dec. 284. See, also, upholding the present New York rule, Brannock v. Elmore (1892), 114 Mo. 56; 21 S. W. 451; Roemer v. Striker (1893), 21 N. Y. Supp. 1090 (1894), 142 N. Y. 136; 36 N. E. 808. See, also, McCafferty v. SPUYTEN DUYVIL, ETC., RAILROAD (1874), 61 N. Y. 178; 19 Amer. Rep. 267; Kelly v. New York (1854), 11 N. Y. 432; Pack v. New York (1853), 8 N. Y. 222; STORRS v. UTICA (1858), 17 N. Y. 104; 72 Amer. Dec. 437. In

STORRS v. UTICA, *supra*, Comstock, J., says: "The opinion [in BLAKE v. FERRIS (1851), 5 N. Y. 48; 55 Amer. Dec. 304], contains a very elaborate, and I doubt not, a very correct exposition of the doctrine of *respondeat superior*, but I feel less sure that the doctrine was applied with strict accuracy to the facts in the case." LOGANS-PORT v. DICK (1880), 70 Ind. 65; 36 Amer. Rep. 166, since overruled in effect; Tibbetts v. Knox, etc., Railroad (1873), 62 Me. 437; Hill v. Schneider (1897), 13 N. Y. App. Div. 299; 43 N. Y. Supp. 1; 1 Am. Neg. R. 141; Wiener v. Hallack, 14 N. Y. Supp. 365; Brennan v. Gellick, 20 N. Y. St. 1023; 30 Abb. (N. C.), 166; see especially BERG v. PARSONS, *supra*. It was held in Roemer v. Stryker, *supra*, that no error had been committed in allowing the defendant to give in evidence a written contract between himself and another whereby the latter agreed to make an excavation, in which

calls for the doing of intrinsically dangerous work.⁸⁷ An eminent authority declares: "Upon the plainest considerations, this principle ought to be applied to the case where an independent contractor, acting within the terms of his contract, sets out a fire on the premises of the proprietor, where he is doing work under contract, and the fire spreads to the lands of an adjoining proprietor, doing damage there; for certainly it must be conceded that a fire, unless guarded, is likely to lead to mischief. Accordingly, it has been held that a corporation owning land is liable in damages for the act of its contractor in negligently and improperly lighting a fire on its land, and permitting it to spread to the land of another owner, although such contractor in so doing disregards specific instructions contained in the contract in regard to the time at which such fire should be lighted. To escape liability, the corporation must show that the act of the contractor was that of a trespasser and not within the scope of the contract."⁸⁸

A railroad company let a contract to another to burn a fire guard along its right of way. Through the contractor's negligence the fire escaped his control and damaged the plaintiff's property. Held: (1) That the work was performed as part of the operation of the railroad and that

⁸⁷ *Black v. Christ Church Finance Co.* (1894), A. C. 48; 7 Am. Neg. R. 158, n; *Cameron v. Oberlin* (1897), 19 Ind. App. 142; 48 N. E. 385; 16 Am. Neg. R. 599, 608, in which latter case it appeared that the negligence flowed directly from the acts which the contractor agreed to do and was by the landowner authorized to do.

⁸⁸ *Thomps. Neg.*, Sec. 656, citing *Black v. Christ Church, etc., Co.*, *supra*. A municipal council which

contracted with a person for the destruction of dead animals by burning in the council's paddock, the work being highly dangerous at the time the contract was made, but susceptible of being safely performed if certain precautions were observed, was held responsible for injuries caused to plaintiff's property as a result of the contractor's failure to observe these precautions. *Hannan v. Shepparton* (1892, Vict.), 14 Aust. L. T. 83.

is intrinsically dangerous and constitutes *ipso facto* a nuisance, where the injury is produced by blasting in the construction of a wagon road through an uninhabited and substantially untraveled, wild, mountainous region.⁸⁶

Sec. 74. Same, Fires.

There is an irreconcilable conflict among the cases involving the question as to the employer's liability for the act of an independent contractor in the use of fire, in the performance of his contract. Thus, in the opinion of some courts, a contract to burn brush on the defendant's lands

⁸⁶ HOUGHTON v. LOMA, ETC., CO. (1907), 152 Cal. 500; 93 Pac. 82; 14 L. R. A. (N. S.), 913. "It would seem to be held generally that blasting operations in themselves are not considered so intrinsically dangerous as to render an employer liable for the negligent act of an independent contractor from the very act of employing him to do the work contracted for, or to impose upon such employer the absolute duty to take special precautions to avoid injuries from the operations; in other words, the mere employing of an independent contractor to perform work requiring blasting will not *ipso facto* take the case out of the general rule, and render the employer liable for injuries caused by the negligent acts of the independent contractor. Numerous cases, indeed, do hold that the employer is liable for the acts of an independent contractor in blasting operations; but these cases are

not necessarily opposed in principle to the rule set out above, as they are generally decided upon the facts of the particular case, and those facts are such as clearly to render the rule inapplicable or to form a clear cut exception." Note to HOUGHTON v. LOMA, ETC., CO. (1907, Cal.), 14 L. R. A. (N. S.), 914. A railway construction contract specified that all damages from blasting should be paid by the contractor, and in case any damages should occur to another landowner's premises through the wilfulness or carelessness of the contractor, or his employees, and remain unsettled thirty days, the railroad should have the right to retain in its hands, out of money due the contractor, sufficient to pay such damages; the railroad company was held not liable to third persons for injuries caused by the contractor in blasting. Tibbetts, v. Knox, etc., Railroad (1873), 62 Me. 437.

burden of showing that it was so dangerous is on the plaintiff. Unless the circumstances of the case are such that the mere fact of authorizing the fire to be set is *per se* negligence, then if it is set by an independent contractor, the fact that it escapes his control through his negligence and gets upon the lands of another and there does damage, does not make the landowner, on whose land it is set by the independent contractor, liable for such damage, though the independent contractor undertook the work of clearing the land at a stipulated sum per acre.⁹² In a case where the property owner employed a painter to paint his house for a lump sum, and gave him no directions as to the manner of the work, the painter was held an independent contractor for the result of whose act in setting out a fire by the negligent operation of a paint burner, the proprietor was not liable.⁹³ A town which enters into a contract with an individual for the repair of a highway, including the destruction by fire of brush which has theretofore been cut and piled, is not liable for damages caused by the negligence of such contractor when burning the brush.⁹⁴

Sec. 75. Same, Excavations.

Digging trenches in highways or across footpaths has been considered by many, if not most, courts so dangerous

⁹² FERGUSON v. HUBBELL (1884), 97 N. Y. 507; 49 Amer. Rep. 544. The proprietor of a grain elevator, in which there is much inflammable matter, is not, as a matter of law, guilty of negligence in failing to have automatic sprinklers in the building. Cox v. Central, etc., Railroad (1898), 170 Mass. 129; 49 N. E. 97; 9 Am. & Eng. R. Cas. (N. S.), 591.

⁹³ Francis v. Johnson (1904), 127 Iowa, 391; 101 N. W. 878; 17 Am. Neg. R. 507. A municipality was held not liable where a fire spread from timber which was being burnt on a road by an independent contractor. Carroll v. Plympton (1860), 9 U. C. C. P. 345.

⁹⁴ Shute v. Princeton (1894), 58 Minn. 337; 59 N. W. 1050.

the railroad company could not, by delegating the work to an independent contractor, avoid the liability placed on it by statute; (2) That the work being of a character from which, in the natural course of things, injurious consequences to others might be expected to result, unless means were adopted to prevent them, the railroad company was bound to see that measures were taken to prevent such injury and could not avoid the obligation by letting the work to an independent contractor.⁸⁹

The doctrine of liability for extra hazardous work has been more often rejected in the case of a contract for the setting of fires.⁹⁰ In *ST. LOUIS, ETC., RY. v. YONLY*,⁹¹ the court intimates that such work might be intrinsically dangerous under some circumstances; but holds that the

⁸⁹ *ST. LOUIS, ETC., R. v. MADDEN* (1908), 77 Kans. 80; 93 Pac. 586; 17 L. R. A. (N. S.), 738; 50 Am. & Eng. R. Cas. (N. S.), 48, syllabus by court, citing *inter alia*, *Gillson v. North Grey R. Co.* (1874), 36 U. C. (Q. B.), 475, two judges dissenting; and distinguishing *WABASH, ETC., R. v. FARVER* (1887), 111 Ind. 195; 12 N. E. 296; 60 Amer. Rep. 696; 31 Amer. & Eng. R. Cas. (N. S.), 134. In a note to the *MADDEN* case in 17 L. R. A. (N. S.), 788, citing numerous cases, the learned annotator says, "the extra hazardous nature of this undertaking is deemed to justify the separate note."

⁹⁰ *ST. LOUIS, ETC., RAILROAD v. YONLY* (1900), 53 Ark. 503; 13 S. W. 333; 45 Am. & Eng. R. Cas. 518; 9 L. R. A. 604. See, also, *LEAVITT v. BANGOR, ETC., RAILROAD* (1897), 89 Me. 509; 36

L. R. A. 382; 7 Am. & Eng. R. Cas. 354; 1 Am. Neg. R. 605.

⁹¹ *Supra*, note 90. In this case injuries resulted to an adjoining proprietor from the negligent performance by a third person of his contract to burn the brush growing upon a railroad company's right of way, when such burning, if carefully done, would have caused no injury. Judge Thompson says this is "opposed to sound principle." Comm. on Neg., Sec. 656, note 37. That burning piles of brush is not considered intrinsically a dangerous work, see *Shute v. Princeton Tp.* (1898), 58 Minn. 337; 59 N. W. 1050; *Carlson v. Stocking* (1895), 91 Wisc. 432; 65 N. W. 58; *STONE v. RAILROAD CORPORATION* (1849), 19 N. H. 427; 57 Amer. Dec. 192. But see, *Mahoney v. Dankwert* (1899), 108 Iowa, 321; 79 N. W. 134.

require such holes either to be dug in the street or to be left unguarded, but leaves the manner of erecting the line entirely to the railroad company.⁹⁹

Sec. 76. Same, Explosives.

A natural gas company employed a contractor in a city street, and through his negligence an explosion occurred. The gas company was held not liable unless it had accepted the work from the contractor prior to the explosion, or knew the work was so done as to be dangerous.¹⁰⁰ In an Illinois case, a gas company contracted for the doing of certain work which required the forcing of explosive gas through pipes not yet thoroughly cemented; the gas leaked and caused an explosion; the gas company was held liable for the resulting damages, notwithstanding the fact that the work was done by a construction company which was an independent contractor. In this case, all the officers and employees of the construction company were connected with the gas company.¹⁰¹ It has very recently been held that an employer is liable for injuries due to an independent con-

⁹⁹ *HACKETT v. WESTERN UNION TELEGRAPH Co.* (1891), 80 Wisc. 187; 49 N. W. 822; 10 Rail. & Corp. L. J., 390. A Georgia ruling to the effect that a street railway company authorized to lay its track in a street is not liable for injuries occasioned by the negligence of a servant of an independent contractor whom it has engaged to do the work, where it had reserved no control over his conduct, but that the liability is upon the contractor, is questioned by eminent authority, "since in such a case the work is inherently dangerous and likely to lead to mischief, unless properly guarded, which brings the case

within the operation of another principle; and, moreover, it is a just conclusion that the grant of a franchise to tear up the public street of a city is made upon the implied condition that the grantee will see to it that the public are guarded from unnecessary danger during its operation." *Fulton County Street Railroad v. McConnell* (1891), 87 Ga. 756; 13 S. E. 828; *Thomps. Neg.*, Secs. 652, 671.

¹⁰⁰ *Chartiers, etc., Co. v. Lynch* (1888), 118 Pa. St. 362; 12 Atl. 435.

¹⁰¹ *Chicago, etc., Gas Co. v. Myers* (1897), 168 Ills. 139; 48 N. E. 66. But see, *Chartiers, etc.*,

as not to be assignable so far as liability is concerned.⁹⁵ An incorporated company undertaking to lower the grade of its road while in the receipt of tolls, and while the road is open for travelers, is bound to guard that part retained for public use, to warn travelers of danger threatened by obstructions, and by suitable devices to direct them in the proper route; of which duties it may not divest itself by shifting the responsibility to others.⁹⁶ Excavating adjoining land has also been held intrinsically dangerous within this rule.⁹⁷ The contractor may be liable jointly with his principal to the adjoining owner, although the contractor merely engaged to do the excavating, and did it, supposing that his principal would take measures to support the adjoining land.⁹⁸ On the other hand, it has been held that a telegraph company is not liable to one who is injured by falling into a hole dug in a public street by a railroad company engaged as an independent contractor in erecting a line of poles and wire for it, where the contract does not

⁹⁵ *Spence v. Schultz* (1894), 103 Cal. 208; 37 Pac. 220; *CURTIS v. KILEY* (1891), 153 Mass. 123; 26 N. E. 421; *Burd. Cas. Torts*, 403; *McCARRIER v. HOLLISTER* (1902), 15 S. D. 336; 89 N. W. 862; 91 Amer. St. Rep. 695; 11 Am. Neg. R. 641.

⁹⁶ *LANCASTER AVENUE IMPROVEMENT CO. v. RHODES* (1887), 116 Pa. St. 377; 9 Atl. 852; 2 Amer. St. Rep. 608. As the work of making in the street an excavation to receive one of the columns which are to support an elevated railway is intrinsically dangerous, the company owning the line can not, by intrusting the work to an independent contractor, escape its obligation to see that the pitfall thus created is so guarded as to prevent its being a cause of in-

jury to passersby; for, since this obligation is imperative so long as the excavation exists, notice that it is not sufficiently protected is not a condition of legal responsibility for injuries resulting from it. *Flynn v. New York Elevated Railroad* (1883), 17 Jones & S. 60, in which case the wheels of plaintiff's truck slipped into the hole in question. *Contra*, as to dock commissioners' liability for railroad company under somewhat similar circumstances. *Barham v. Ipswich Dock* (1885), 54 L. T. (N. S.), 23.

⁹⁷ *BONAPARTE v. WISEMAN* (1899), 89 Md. 12; 42 Atl. 918; 44 L. R. A. 482; *Burd. Cas.* 404.

⁹⁸ *GREEN v. BERGE* (1894), 105 Cal. 52; 38 Pac. 539; 45 Amer. St. Rep. 25.

for extra hazardous work has also been rejected in the case of a contract for an exhibition of balloon ascension.¹⁰⁶

Sec. 78. Same, Logging.

A lumberman, contracting for logs to be delivered at the mouth of a stream, is not liable for the destruction of a bridge by reason of the contractor allowing the logs to jam in the stream with those of owners, the accident occurring by reason of a freshet breaking the jam.¹⁰⁷ Where a person employed to haul logs left some of them on a highway, thereby creating a dangerous obstruction which caused injuries to the plaintiff, the employer was held not liable.¹⁰⁸ Where a boom of logs which was to have been towed across an inlet of the sea, which was insecurely fastened, and being set adrift by a storm was driven against the piles supporting a house, the employer was declared not responsible.¹⁰⁹

Sec. 79. Same, Overhanging Objects.

Where a property owner lets to a contractor the work of constructing or repairing an awning over a sidewalk in front of his store, the case "comes under the exception to the general rule; that is, that the work contracted for involves a thing inherently dangerous to the public, from which injuries to those using the streets were probable and might reasonably be anticipated by the proprietor. This is a well-established exception, and has been frequently applied to cases of this character."¹¹⁰

¹⁰⁶ SMITH v. RENICK (1898), 87 Md. 610; 41 Atl. 56; 42 L. R. A. 277.

¹⁰⁷ Overseer, etc., v. Pelton (1901), 129 Mich. 31; 87 N. W. 1029.

¹⁰⁸ Manchester v. Warren (1893), 67 N. H. 482; 32 Atl. 763.

¹⁰⁹ Easter v. Hall (1901), 12 Wash. 160; 40 Pac. 728.

¹¹⁰ MCHARGE v. NEWCOMER (1907), 117 Tenn. 595; 100 S. W. 700; 9 L. R. A. (N. S.), 298, 302, citing JEFFERSON v. CHAPMAN (1889), 127 Ills. 438; 20 N. E. 33; 11 Amer. St. Rep. 139; Wood-

tractor's act in breaking up heavy machinery by dynamite in a large city within 150 feet of highways and residences, as the rule absolving employers from liability for independent contractors' negligence does not prevail where the work contemplated was hazardous and was to be performed within dangerous proximity to persons rightfully on the streets or in the residences near by.¹⁰² The owner and not the maker of a boiler was held liable for its explosion by reason of insufficient repairs where the repairs were made under the supervision of the owner.¹⁰³ A street railroad, which had provided a suitable place for an exhibition of fireworks, which was in charge of a competent independent contractor, was not liable, where a piece of fireworks failing to explode, the father of the man in charge, who was assisting as a volunteer, gave it to the injured boy and told him to take it away and have a good time with it.¹⁰⁴

Sec. 77. Same, Balloon Ascensions.

A street railway company, advertising a balloon ascension at a park owned and controlled by it, was held liable for the death of a child at such ascension caused by the fall of a pole to which the balloon was attached, where proper notice of the fact that it would fall was not given, even though the person making the ascension was employed as an independent contractor.¹⁰⁵ This doctrine of liability

Co. v. Lynch, *supra*. Where a telegraph company laying wires in a highway employed a plumber to solder the joints of tubes, and through the use of a defective benzine lamp an explosion resulted, injuring a passerby, the telegraph company was held liable. Holliday v. National Telegraph Co. (1899), 2 Q. B. 392.

¹⁰² Falender v. Blackwell (1906), 39 Ind. App. 121; 79 N. E. 393.

On the general subject of blasting, see *ante*, Sec. 73.

¹⁰³ James McNeil, etc., Co. v. Crucible, etc., Co. (1904), 207 Pa. St. 493; 56 Atl. 1067.

¹⁰⁴ Noggle v. Carlisle, etc., R. (1906), 215 Penn. 357; 64 Atl. 547; 44 Amer. & Eng. R. Cas. (N. S.), 627.

¹⁰⁵ RICHMOND, ETC., RAILROAD V. MOORE (1897), 94 Va. 493; 27 S. E. 70; 37 L. R. A. 258.

CHAPTER IV.

EMPLOYER'S EXCEPTIONAL LIABILITY—II. CHARACTER OF OBLIGATION.

SECTION	SECTION
85. Absolute duty.	99. Same—Furnishing appliances.
86. Statutory duty, generally.	100. Building contracts, generally.
87. Same—Excavating, generally.	101. Same—Relation, how shown.
88. Same—Same—Shoring.	102. Same—Management of machinery.
89. Same—Authorized appropriations.	103. Same—Party walls.
90. Same—Conditional undertakings.	104. Same—Removing dangerous wall.
91. Same—Licensee's liability to public.	105. Same—Exempt though fatal.
92. Proprietor's duty regarding sidewalks.	106. Landlord and tenant, generally.
93. Same—Regarding highways.	107. Same—Discharging legal duty.
94. Same—Removing condemned buildings.	108. Same—Personally supervising.
95. Same—As to adjoining owners.	109. Same—Work imminently dangerous.
96. Same—Condition of premises generally.	110. Master's non-assignable duty.
97. Same—Duty to supervise.	
98. Same—Duty as to invitees.	

Sec. 85. Absolute Duty.

The broadest statement of this exceptional liability is as follows: "The weight of reason and authority is to the effect that where a person is under a duty to the public or third person to see that work he is about to do, or have done, is carefully performed, so as to avoid injury to others,

On the other hand, an abutting owner was held not liable for a sign falling down during a violent storm, from his building onto one using the adjacent sidewalk, where the sign was placed by an independent contractor about two weeks before.¹¹¹

MAN V. METROPOLITAN RAILROAD Co. (1889), 149 Mass. 335; 21 N. E. 482; 6 Rail. & Corp. L. J., 72; 4 L. R. A. 213; 14 Amer. St. Rep. 427; 12 Am. Neg. Cas. 80; OMAHA V. JENSEN (1892), 35 Nebr. 68; 52 N. W. 833; 37 Amer. St. Rep. 432; ENGEL V. EUREKA CLUB (1893), 137 N. Y. 100; 32 N. E. 1052; 33 Amer. St. Rep. 695; CAMERON, ETC., CO. V. ANDERSON (1904), 98 Tex. 156; 81 S. W. 282; 1 L. R. A. (N. S.), 198; 16 Am. Neg. Reg. 599, 608; SOUTHERN OHIO RAILROAD V. MOREY (1890), 47 Ohio St. 207; 24 N. E. 269; 7 L. R. A. 701; 43 Amer. & Eng. R. Cas. 97. Plaintiff recovered judgment for damages for injuries inflicted on her while walking along a much used public street in a city, by the falling of a hammer from an overhead bridge in course of construction on defendant's line of railway. The evidence showed that when the necessary riveting was being done the workmen had to work very rapidly, and as a result rivets, tools, etc., frequently fell to the ground beneath, rendering travel unsafe. The bridge was constructed by contractors of large experience. The work was being done under state authority

and with the city's consent. The court instructed that it was no defense that the work was being done by independent contractors. This was affirmed on appeal. PHILADELPHIA, ETC., R. V. MITCHELL (1908, Md.), 69 Atl. 422; 17 L. R. A. (N. S.), 974, citing cases.

¹¹¹ McNulty v. Ludwig (1908), 109 N. Y. Supp. 703. While plaintiff was walking along the street, she was injured by terra cotta gargoyle falling on her from a building. Defendant had been employed by the building owner to decorate it and had completed it two days before the accident. The building itself was unfinished. The contractor, after the decorations were done, had placed ropes, etc., on parts covered thereby which might have disarranged them, but there was also evidence that they flapped in the wind, and that when one of the large buntings came down, after being blown up by the wind, it brought with it the terra cotta which struck plaintiff, and it was held that defendant's negligence was not established. Cross v. Koster (1897, N. Y. App. Div.), 3 Amer. Neg. Rep. 256.

Sec. 86. Statutory Duty, Generally.

If the employer is under an obligation of positive law to do a particular thing, or to observe particular safeguards, he can not relieve himself of this liability by putting the work into the hands of an independent contractor.⁴ Where

shift it to the shoulders of another, but is still liable for its non-performance, although the fault be directly attributable to an independent contractor. This is equally true of common law duties. Barrows Neg., p. 164. "Of this nature is the duty which rests upon the owners of fixed property of guarding dangerous substances collected on their property, or of guarding dangerous work authorized by them to be done thereon so as to prevent mischief to others. So, a carrier of passengers is under an obligation of exercising a high degree of care to the end that the vehicles and means of transportation, provided by him, shall be safe for the purposes intended; which care cannot be devolved by him on an independent contractor. Other public duties are devolved upon railroad companies and other corporations by their charters; and it is a sound view that they can not escape responsibility for the failure to perform such duties by delegating the performance of them to independent contractors who may be pecuniarily irresponsible, each of whom may proceed into the country with an army of laborers and perform the most oppressive acts towards separate agricultural proprietors, who, if such were the law, would be

left substantially without remedy." Thomps. Neg., Sec. 665, referring to *Clark v. Hannibal, etc., R. Co.* (1865), 36 Mo. 202; *Meyer v. Midland, etc., R.* (1873), 2 Nebr. 319; *McKinley v. Chicago, etc., R.* (1890), 40 Mo. App. 449. It has been held in many cases that where the work is wrongful naturally, the proprietor is liable. *Chicago v. Norton, etc., Co.* (1900), 97 Ills. App. 651; (1902), 196 Ills. 580; 63 N. E. 1043; *Murray v. Arthur* (1901), 98 Ills. App. 331; *Omaha, etc., Co. v. Hargadine* (1904, Nebr.), 98 N. W. 1071; *Holliday v. National Telephone Co.* (1899, C. A.), 2 Q. B. 392.

⁴ *HOLE v. SITTINGBOURNE RAILROAD* (1861), 6 Hurl. & N. 488; 30 L. J. Ex. 81; 7 Am. Neg. R. 157, n.; 8 Id. 301, n; *Reuben v. Swigert* (1898), 7 Ohio Dec. 638; 15 Ohio C. C. 565; *Downey v. Low* (1897), 22 N. Y. (App. Div.), 460; 48 N. Y. Supp. 207. "The reports contain a large number of cases in which the plaintiff has been held to be entitled to recover on the ground that the damage suffered by him resulted from the infringement of a duty imposed upon the defendant by a statute or a municipal ordinance." Note to *ANDERSON v. FLEMING* (1903, Ind.), in 66 L. R. A. 121, citing cases.

he can not, by letting it to a contractor, avoid his liability, in case it is negligently done to the injury of another."¹ "There are certain absolute duties resting upon natural persons and corporations, either by operation of law or by reason of having been voluntarily assumed. The law does not permit a person or corporation to cast off such a duty upon an independent contractor, so as to exonerate himself or itself for the consequences of its non-performance."² Where a person is bound to the performance of an act as a duty, or is held to a certain standard of conduct, he can not escape responsibility by intrusting its performance to another; and if the person so intrusted fails to perform such act, or conform to such standard of conduct, whether he bore the relation of contractor or servant, the person on whom the duty rests is liable for his negligence, and it is immaterial whether the obligation is imposed by contract or general law.³

¹ COVINGTON, ETC., Co. v. STEIN-BROCK (1899), 61 Ohio St. 215; 55 N. E. 618; 76 Amer. St. Rep. 375; 7 Am. Neg. R. 154.

² Thoms. Neg., Sec. 665, citing JEFFERSON v. CHAPMAN (1889), 127 Ills. 438; 20 N. E. 33; CABOT v. KINGMAN (1896), 166 Mass. 403; 44 N. E. 344; 33 L. R. A. 45. Generally, the performance of no duty owed to the public or to private individuals can be delegated so as to escape liability. Lebanon Light, etc., Co. v. Leap (1894), 139 Ind. 443; 39 N. E. 57. If a person or corporation stands under pre-existing obligations, however imposed or assumed, to do a particular thing, or to do it in a particular way, such person or corporation cannot unload such responsibility upon some one else.

FOWLER v. SAKS (1890), 7 Mackey (D. C.), 507; 7 L. R. A. 649.

³ MATTISE v. MANUFACTURING Co. (1894), 46 La. Ann. 1535; 16 So. 400; 49 Amer. St. Rep. 356; CITY, ETC., RAILROAD Co. v. MOORES (1894), 80 Md. 348; 30 Atl. 643; 45 Amer. St. Rep. 345; STORRS v. CITY OF UTICA (1858), 17 N. Y. 104; 72 Amer. Dec. 437; COLGROVE v. SMITH (1894), 102 Cal. 220; 36 Pac. 411; 27 L. R. A. 590; WILLIAMS v. IRRIGATION Co. (1892), 96 Cal. 14; 30 Pac. 961; 31 Amer. St. Rep. 172; Pye v. Faxon (1892), 156 Mass. 471; 31 N. E. 640; HOLE v. RAILROAD Co. (1861), 6 Hurl. & N. 483; 7 Am. Neg. R. 157, n.; 8 Id. 301, n. It is a precept of law that, when the performance of a duty rests upon one absolutely, he cannot

that the principle of liability applies only where there is an *express and fully defined statutory duty, absolutely imposed* upon the owner of the premises, pointing out how and when he is to perform it; and upon this theory it was held that a Pennsylvania statute, relating to a natural gas company, enacting "that any company laying a pipe-line under the provisions hereof, shall be liable for all damages occasioned by reason of the negligence of such gas company," did not extend so far as to make such a company liable for damages caused by an explosion which took place

lawfully, but who did it unlawfully. The privilege of doing or having the act done for his benefit is granted only on condition of its being done in a certain way, and he impliedly agrees to answer for injuries which may flow from the doing of the act unless it is done in that way. If we pause to consider the effect of these decisions, we shall see that they go far toward bringing us back to the doctrine of *BUSH v. STEINMAN* (1799, 1 Bos. & P. 404)." *Thomps. Neg.*, Sec. 667, p. 607. Under a statute requiring contracts for curbing streets to provide that the work be done under the immediate supervision of the mayor and city engineer, it is the city's duty to use at least ordinary care to see that the stones are not placed and kept in a dangerous condition, and where a boy was injured by the fall of a stone placed in an unstable position, it is no defense to show that an independent contractor was doing the work. *Frankfort v. Allen* (1904), 26 Ky. L. R.

581; 82 S. W. 292. Secs. 1165-7, Tennessee Code, touching the liability which railroads incur by failing to observe certain precautions in running their trains, do not apply to contractors engaged in constructing a railroad. *Griggs v. Houston* (1881), 104 U. S. 553; 8 Amer. & Eng. R. Cas. 359, per Waite, C. J. In actions against a railroad company for injuries caused by negligence in restoring a highway after building its road as required by statute (Tex., R. S., Art. 4426), it is no defense that the work was being done by an independent contractor. Here the company was held liable where, in running its road across a highway, a temporary way was built for the public across the track, which, on completing the road and restoring the crossing, was left in a dangerous condition and notice thereof was not given the public. *Texas, etc., R. v. Johnson* (1899, Tex. Civ. App.), 6 Amer. Neg. Rep. 716.

a statute or the common law imposes the duty upon a person to a contract to take agreed precautions in the doing of certain work, the employer is bound to see that such precautions are taken and if not taken the employer is liable.⁵ A person may not invoke the rule of exemption to excuse the non-performance of a duty cast on him by express statute. The sound rule is said to be that where a statutory obligation is imposed upon a person he is liable for any injury which arises to others in consequence of its having been negligently performed; and this whether it were performed by himself or by a contractor employed by him.⁶ On the contrary, there is a holding to the effect

⁵ *WATER CO. V. WARE* (1872), 16 Wall. (U. S.), 566. When the obligation is raised by statute or ordinance, the responsibility for its performance is absolute. Barrows Neg., p. 165. Sec. 58, English Railway, etc., Act of 1845, provides that if the company shall in the course of making the railway, use or interfere with any road, it shall from time to time make good all damage done by it to such road; a railway company used certain roads by the carriage of building materials over the same, to be and actually used in making such railway, etc. Two judges held it had thereby done damage to such roads, and it was held liable to make good the damage so done, although the materials were really conveyed in the carts of the contractors or subcontractors, or of other persons employed by it. West, etc., Railroad v. Wakefield, etc., Board (1864), 33 L. J. Mag. Cas. (N. S.), 174.

⁶ *Gray v. Pullen* (1864), 5 Best. & S. 970; 7 Am. Neg. R. 158, n.; *HOLE V. SITTINGBOURNE RAILROAD*, *supra*; *Weber v. Buffalo Railroad Co.* (1897), 47 N. Y. Supp. 7. Decisions holding employers liable for the non-performance by independent contractors of duties imposed by express statute "really fall within the class of cases * * * which hold that a person cannot excuse the doing of an act unlawful *per se*, by alleging that it was done by another, who contracted to do it for him. A statute empowers a person or corporation to do a certain act in a certain way. He attempts to do it, but does it in a different way. In so far as he does it in a different way it is an unlawful act, generally a nuisance. If an injury happens to one in consequence of its being thus done in an unlawful manner, he cannot avoid liability by alleging that the wrong was that of one with whom he had contracted to do the act

owner, injured by a violation of it, that the former engaged an independent contractor to do it.⁸ The rule under this head has been extended to cases where a railroad is by statute authorized to construct its road across a highway, and by the negligence of an independent contractor the highway is rendered unsafe, even though the statute does not expressly require the railroad to observe particular safeguards.⁹

Sec. 88. Same, Shoring Excavations.

The liability of the landowner making an excavation for the trespass of his contractor in entering an adjoining building of the plaintiff for the purpose of shoring it up, where there was a statute requiring the excavating landowner to shore up his neighbor's buildings, was discussed in a leading New York case.¹⁰ In Pennsylvania it is held that if the house of an abutting owner is undermined and destroyed as the direct result of the construction of a subway on which the house abuts because of the contractor's

⁸ *Dorrity v. Rapp* (1878), 72 N. Y. 307. See, also, Secs. 95, 141, *et seq.*, *post*.

⁹ *Deming v. Terminal Railway Co.* (1900), 49 N. Y. App. Div. 493; 63 N. Y. Supp. 615. Cf., Sec. 116, *et seq.*, *post*. Unless the obligation to place a boarding in front of a building under erection is imposed by a statute applicable to the locality in which the work is being executed, the owner of the building is not liable for injuries resulting from the fact that the contractor by whom it was being erected, omitted to put up the boarding. *Crawford v. Peel* (1887), Ir. L. R., 20 C. L. 332. But see note 7, *supra*.

¹⁰ *KETCHAM v. NEWMAN* (1894), 141 N. Y. 205; 36 N. E. 197; 24 L. R. A. 102. Where the walls of a house adjacent to one being erected for defendant falls as a result of the fact that the trench of the wall of the new house is excavated by the contractor for the work to the depth indicated by the plans, and by reason of such contractor's failure to shore up the adjacent wall properly, the injury is deemed to be the consequence of the act which the contractor was employed to do and the landowner is therefore liable. *Wheelhouse v. Darch* (1877), 28 U. C. C. P. 269.

while its pipes were being laid, and which was attributable to the negligence of an independent contractor employed in laying them, the company not having accepted the work and having no notice of the fact that the contractor was proceeding with the work in a negligent manner.⁷

Sec. 87. Same, Excavating, Generally.

If there is an absolute duty, by common law or statute, upon a proprietor proposing to excavate for the purpose of building, it will be no defense to the action of an adjoining

⁷ *Chartiers, etc., Gas Co. v. Waters* (1888), 123 Pa. St. 220; 16 Atl. 423. "It should be observed in reference to this case that it was not well decided, upon the ground already considered (*ante*, Sec. 652), that a proprietor who employs an independent contractor to do the work which, unless guarded and cared for, is likely to lead to mischief, is under the personal obligation of taking care and pains to prevent such mischief. All experience affirms the conclusion that, with the exception of gunpowder, dynamite, and similar explosives, few substances are more likely to lead to mischief, unless properly guarded, than what is called natural gas." *Thomps. Neg.*, Sec. 667, note 97. "In order that an employer may be held liable on the ground that his contractor violated a statutory duty imposed on him, the terms of the statute must be such as to show that the legislature intended to subject him to an express and definite obligation, either as regards the

work which he is to do or as regards the manner in which he is to do it." Note to *ANDERSON v. FLEMING* (1903, Ind.), 66 L. R. A. 125. "If the statute relied upon expressly provides for the contingency of the works being executed under an independent contract and declares that the duty must be fulfilled by the employee or contractor, the statute will not ordinarily be construed as enlarging the personal liability of the employer, the intention of the legislature being presumed to be that the duty shall then be discharged by the employer only when the work is done under his immediate control." *Id.* In a dictum in an Irish case, *Murphy, J.*, was of the opinion that even if a breach of a statutory obligation had been proved, the owner's liability did not extend beyond the penalty of the statute. This view is condemned by a learned annotator and author. *Crawford v. Peel* (1887), Ir. L. R. 20, C. P. 332. Criticised in *Labatt on Master & Servant*, Secs. 799-800.

the work is to be deemed inherently dangerous, unless these precautions are taken. In such cases the employer is bound to see that the precautions are taken, and can not escape responsibility by letting the work to ever so skillful or careful a contractor.¹³ If a permit to place building material in the street is coupled with a condition that it be lighted and guarded, the lot owner is liable for the failure of a contractor to light and guard material placed there.¹⁴ Where an employer is bound by a statute to do a thing efficiently and an injury results from its inefficiency the employer is liable.¹⁵ In a leading English case, a railway company was empowered by statute to construct a railway bridge across a navigable river, the statute providing that it should not be lawful to detain any vessel navigating the river for a longer time than sufficient to enable any carriages, animals or passengers, ready to traverse, to cross the bridge, and to open it to admit such vessel. The company employed a contractor to construct the bridge in conformity with the statute; but before the work was completed, the bridge, from some defect in its construction,

¹³ *Gray v. Pullen* (1864), 5 B. & S. 970; 7 Am. Neg. R. 158, n.; *Wilson v. White* (1883), 71 Ga. 506; 51 Amer. Rep. 269; *Atlanta, etc., Railroad v. Kimberley* (1891), 87 Ga. 161; 13 S. E. 277; 27 Amer. St. Rep. 231; *Hinde v. Wabash, etc., Railroad* (1853), 15 Ills. 72; *Brannock v. Elmore* (1892), 114 Mo. 55; 21 S. W. 451; *Houston, etc., Railroad v. Meador* (1878), 50 Tex. 77; *Smith v. Milwaukee, etc., Exchange* (1895), 91 Wisc. 360; 64 N. W. 1041; 51 Amer. St. Rep. 912.

¹⁴ *Reuben v. Swigart* (1898), 7 Ohio Dec. 638; 15 Ohio C. C. 565.

¹⁵ *Berg v. Parsons* (1898), 156 N. Y. 109; 50 N. E. 957; 41 L. R. A. 391; 66 Amer. St. Rep. 542; 4 Am. Neg. R. 432, citing *Smith v. Milwaukee, etc., Exchange, supra*. The New Jersey courts seem to hold the view of *Berg v. Parsons*, as see *Cuff v. Newark, etc., Railroad* (1870), 35 N. J. Law, 1; 10 Amer. Rep. 205; 16 Am. Neg. Cas. 668, n.; *Schutte v. United Electric Co.* (1902), 68 N. J. Law, 435; 53 Atl. 204; 16 Am. Neg. R. 614, n; and see *Hoff v. Shockley* (1904), 122 Iowa, 720; 98 N. W. 573; 64 L. R. A. 538; 101 Amer. St. Rep. 289; 16 Am. Neg. R. 607, n.

negligence, the employing city will be liable, for the reason that the work is of such a kind that unless it is guarded, attended to and shored up by the party doing the work (*i. e.*, the city) it is likely to lead to mischief to the property of abutting owners, which circumstance puts upon the city the primary duty of seeing that it is so guarded and shored up, which duty it cannot cast off upon an independent contractor, who may be insolvent, so as to shift its responsibility for the damages.¹¹

Sec. 89. Same, Authorized Appropriations.

If the charter of a corporation formed for public purposes authorizes it to enter upon the land of private proprietors and take therefrom materials to be used in the construction of its works, the corporation will be answerable for any such materials taken by its contractors, whether it authorized the taking or not, and no matter what its arrangements between itself and its contractors may be.¹²

Sec. 90. Same, Conditional Undertakings.

There is substantial unanimity in the view, that when a valid statute or municipal ordinance commands the observance of certain precautions in doing particular work,

¹¹ *Marsh v. Philadelphia* (1894), 8 Pa. Dist. Rep. 340; *Stork v. Philadelphia* (1900), 195 Pa. St. 101; 45 Atl. 678; 49 L. R. A. 600; (1901), 199 Pa. St. 462; 49 Atl. 236.

¹² *Lesh v. Wabash, Etc., Co.* (1852), 14 Ills. 85; 56 Amer. Dec. 494; *Hinde v. Wabash, etc., Co.* (1853), 15 Ills. 72. If any special provision of a statute authorizing a lease by a railroad company

has not been duly followed, the result is the same as if the contract of lease had been wholly unauthorized. *Ricketts v. Chesapeake, Etc., Railroad* (1890), 33 W. Va. 433; 10 S. E. 801; 7 L. R. A. 354; 25 Amer. St. Rep. 901; *Freeman v. Minneapolis, etc., Railroad Co.* (1881), 23 Minn. 443; 10 N. W. 594. See, generally, as to lessee operating road, Sec. 126.

fails to build a temporary roof over the sidewalk in front of the building, does not enlarge the liability of the property owner and that it applies to the owner only in cases where the building is being erected under the direction and control of the owner.¹⁸

Sec. 91. Licensee's Liability to Public.

On the other hand, the New York Court of Appeals, in a case wherein a license or grant was given by the authorities of a city to certain persons to construct a sewer in one of its streets, with the proviso "that the grantees should cause proper guards and lights to be placed at the excavation, and should be answerable for any damages or injuries which might be occasioned to persons, animals or property in the construction of the sewer," held that this provision did not inure to the benefit of a stranger, so as to render the grantees liable to him for the negligence of an independent contractor, to whom they had let out the job and for whose negligence they would not ordinarily be responsible.¹⁹ But this was questioned by the same court in a later case.²⁰ A street railroad company's liability to pay

¹⁸ *Koch v. Fox* (1892), 75 N. Y. Supp. 913. The employer was held liable in several early Scotch cases where a contractor failed to fence off a building under erection in accordance with the provisions of a police act. *Binnie v. Parlane* (1825), 4 Sc. Sess. Cas., 1st series, 122; *Chapman v. Parlane* (1825), 3 Sc. Sess. Cas., 1st series, 585. Liability for the breach of the imperative duty imposed by a city license upon one owning a building being constructed to keep secure a roof built over the sidewalk so as to

prevent accidents to pedestrians, cannot be avoided by the fact that the roof fell in consequence of an excavation made by an independent contractor. *Scheller v. Silbermintz* (1906), 50 Misc. 175; 98 N. Y. Supp. 230.

¹⁹ *BLAKE v. FERRIS* (1851), 5 N. Y. 48; 55 Amer. Dec. 304.

²⁰ *STORRS v. UTICA* (1853), 17 N. Y. 106; 72 Amer. Dec. 437. "It is manifestly contrary to sound principle. If A. makes a contract with B. for the protection of C., and C. is injured in consequence of B. breaking the contract, C.

could not be opened and plaintiff's vessel was prevented from navigating the river. The defendant company was held liable for the damage.¹⁶ A corporation bound, in consideration of the franchise, to keep a road or bridge in repair, is liable for injury to a person from want of repair, whether the defect is patent or latent, unless the plaintiff was in default or the defect was due to inevitable accident, tempest or lightning, or a third person's wrongful act, of which it had no notice or knowledge; and this liability attaches although ordinary care was used in the erection or repair, and the work was done by competent workmen under contract.¹⁷ It has been held that an ordinance imposing a penalty upon the owner *or* general contractor engaged in the construction of a building over a certain height, who

¹⁶ *HOLE V. SITTINGBOURNE, ETC., RAILROAD* (1861), 6 Hurl. & N. 483; 30 L. J. Ex. 81. Under an English statute, defendant was empowered to make a drain from his premises to a sewer, by cutting a trench across the highway. The statute carefully provided that where the surface of a highway should be thus broken, the one breaking it should restore it to its former condition, or be subject to a penalty for a failure to do so. Defendant employed to do this a contractor by whose negligence the drain was improperly filled, in consequence of which damages ensued to plaintiff. The Queen's Bench was unanimously in favor of defendant. On appeal, the Exchequer Chamber was unanimously in favor of reversal. *Gray v. Pullen* (1864), 5 Best. & S. 970.

¹⁷ *PENNSYLVANIA, ETC., CO. V.*

GRAHAM (1869), 63 Pa. 290; 3 Amer. Rep. 549. Cf., *Downey v. Lowe* (1897), 22 App. Div. 460; 48 N. Y. Supp. 207, in which the plaintiff fell into a coal chute left in the highway by the licensee's contractor. A private railway track was built to a certain manufacturing establishment, under a city license on stringent conditions, designed to prevent accidents. No one but the defendant company had any right to build or maintain it. Hence, all who used the track for the purposes for which it was constructed were held to be using it as the owner's agents, for whose acts they were liable. This applies even to the operatives of the railway company with whose track the private track in question was connected. *McWilliams v. Detroit, etc., Co.* (1875), 31 Mich. 274.

the opening made by removing under a license from the civil authorities a grating over an area, the Illinois court held the person injured could not recover from the landowner. This was very soon afterwards disapproved by the United States Supreme Court, but was later followed by the court of its origin.²³

Sec. 92. Proprietor's Duty Regarding Sidewalks.

There is considerable conflict of authority as to the liability of the proprietor of premises for the acts of an independent contractor or of his servants in creating defects in or dangerous conditions upon public sidewalks adjoining

public carefully to exercise the privilege and not interfere with the safety of passersby. *Evans v. Martin* (1880), 6 Vict. L. R. 176.

²³ *SCAMMON v. CHICAGO* (1861), 25 Ills. 424; 79 Amer. Dec. 334; 14 Am. Neg. Cas. 418, n.; *Chicago v. Robbins* (1862), 2 Black (U. S.), 418; (1866), 4 Wall. (U. S.), 657; *Kepperly v. Ramsden* (1876), 83 Ills. 354. "Placing an obstruction such as the one involved in this case (*i. e.*, a pile of cinder alongside a street car track) in the street is *prima facie* unlawful. If the person so placing the obstruction relies upon an express license obtained from the city, the burden is on him to show the existence of the permit; or, if it is his contention that the obstruction is of a character such as he may lawfully place in the street without any express permission from the city authorities, then such circumstances must appear in proof.

Having placed an unlaw-

ful obstruction in the street, its liability for the consequences thereof continued, notwithstanding it may also have been the duty of the contractor to remove the obstruction." *WOODMAN v. METROPOLITAN RAILROAD CO.* (1889), 149 Mass. 335; 21 N. E. 482; 4 L. R. A. 213; 14 Amer. St. Rep. 427; 6 Rail. & Corp. (L. J), 72; 12 Am. Neg. Cas. 80. "Appellant placed this obstruction in the street at its peril. It was bound to answer for the consequences.

After the cinders were in the street, the first and most imperative duty that rested upon appellant and the contractor was to remove them. After they were there, however, and until they could be removed, it was the duty of appellant, as well as the contractor, to guard the public against any injury from the obstruction." *Kenyon v. Chicago City Railway Co.* (1908), 235 Ills. 406; 85 N. E. 660.

damages to persons for injuries resulting from its performance of the work of reconstructing a highway bridge over a canal, such work being done under a permit granted upon the condition that those damages shall be paid, can not be avoided by delegating the work to a contractor.²¹

A person who obtains a license from municipal authorities to encumber a street while his ice house is being filled is liable for injuries caused by unlawful obstructions created in the street by blocks and fragments of ice, although the work is done for him by a contractor.²² Where a person fell into

may recover damages of B." *Thomps. Neg.*, Sec. 674, citing *Langridge v. Levy* (1837), 2 Mees. & W. 519; 4 Mees. & W. 337. In the case cited the city granted a license containing a certain proviso intended for the protection of its citizens. When the grantee accepted the license, the proviso acquired the force of a contract. The one to whom the defendant delegated the construction of the work failed to take the precautions stipulated for in the proviso, and in consequence of this, a citizen, for whose benefit the proviso was intended, was injured. "Here was clearly a cause of action, on his part, against the defendant. If there was not, efforts of this kind on the part of a city to protect its citizens must be rendered, to a great extent, nugatory." *Thomps. Neg.*, p. 617, citing *HOLE v. SITTINGBOURNE, ETC., RAILROAD* (1861), 6 Hurl. & N. 483.

²¹ *Weber v. Buffalo Railroad Co* (1897), 20 App. Div. 292; 47 N. Y. Supp. 7.

²² *Darmstaetter v. Monahan*

(1873), 27 Mich. 188. "The virtual effect of this doctrine is that the privilege so granted is regarded as being subject to the implied condition that the licensee shall see to it, at his peril, that the safety of the public is secured, so far as that result can be attained by the exercise of reasonable care. *A fortiori* will the licensee be held liable for the non-performance of that duty where an express condition to this effect was attached to the grant of the privilege." Note to *ANDERSON v. FLEMING* (1903, Ind.), 66 L. R. A. 135. A builder licensed to erect a boarding which encroached on a street, made it with a movable panel for convenience. Once when the one whose duty it was to remove the panel was away, a subcontractor's employee removed it and placed it so negligently that it was blown down injuring a passerby. The builder was held liable on the ground that having received a license to encroach on a public street to facilitate the erection of the building, he was under a special obligation to the

narily covered by a grating scuttle, a trap-door, and who makes a contract which requires that the aperture shall be opened while the stipulated work is being performed, is answerable for injuries received by a passerby in consequence of the failure of the contractor's servants to close the aperture or to fasten the covering securely."²⁶ So also, the proprietor was held liable where the servant of an independent contractor left a coal chute unguarded;²⁷ and where such servants failed to light and guard building material deposited in the street.²⁸

²⁶ Note to *JACOBS v. FULLER, ETC., Co.* (1902), 67 Ohio St. 70; 65 N. E. 617; 13 Am. Neg. R. 208; in 65 L. R. A. 844, citing cases. Plaintiff, a pedestrian, who fell into a coal hole in a sidewalk adjoining land of defendant, in possession of a tenant, recovered damages, it appearing that the coal hole was used in connection with the land, and its cover was defective prior to the execution of the lease, to the knowledge (actual or implied) of the owner. *Hill v. Hayes* (1908), 199 Mass. 411; 85 N. E. 434. In repairing a sidewalk on a public highway, independent contractors are required to do whatever the law requires the property owner to do. *KAUFMAN v. ROTHWELL* (1908, Tex.), 109 S. W. 1089; 17 L. R. A. (N. S.), 758.

²⁷ *Downey v. Low* (1897), 48 N. Y. Supp. 207. "It is a matter of such common knowledge as to require the contractors to take notice of it that the sidewalk would be used by pedestrians at night, and that one who had no notice of the existence of such an

obstruction (planks laid across a newly made cement walk) would be liable to stumble on it and thereby sustain an injury; it becomes the duty, therefore, of the contractors to guard against such an event by placing guards or lights, etc. Where this is not done, the liability of the property owner and of the contractors is beyond question." *KAUFMAN v. ROTHWELL, supra*.

²⁸ *Reuben v. Swigart* (1898), 7 Ohio C. Dec. 638; 15 Ohio C. C. 565. With reference to the care required in replacing the cover of a coal hole in a sidewalk, the distinction has been taken that the owner of the adjacent building is not responsible for the negligent manner in which a coal company performs its contract in delivering coal through such a coal hole, but that such exemption from responsibility continues only while the coal company is performing its contract; after which time it is the duty of the owner to give his personal attention, to the end that the cover of the holes is properly replaced so as

such premises, and such conflict is noticeable even in the decisions of the same given jurisdiction. On the one hand the rule as to liability for safety of premises has been extended to the protection of pedestrians in a public way injured by inadvertently falling into unguarded excavations adjacent to the sidewalk.²⁴ In New York one who had contracted to build a block of houses and who had let out the work of excavating, blasting, etc., to a subcontractor, was held responsible for injury to a third person occasioned by falling into an excavation made in the sidewalk by the subcontractor or his servants, notwithstanding the fact that the subcontractor had stipulated to guard against accidents by proper precautions and to make good all damages, on the principle that the work contracted for was wrongful *per se*, the consent of the public authorities not having first been obtained, and the principal contractor hence became *quasi-insurer* of the public against the injurious consequences of it.²⁵ "A person who maintains for his own convenience, on the surface of a public footpath adjacent to the premises occupied by him, an aperture which is ordi-

²⁴ *Wiggin v. St. Louis* (1896), 135 Mo. 558; 37 S. W. 528.

²⁵ *Congreve v. Smith* (1858), 18 N. Y. 79; Chase's C. Torts, 180; *CREED v. HARTMAN* (1864), 29 N. Y. 591; 86 Amer. Dec. 341. The fact of letting to an independent contractor the work of building area walls and constructing coal vaults under a sidewalk in front of his premises will not relieve the owner of a city lot from his personal duty of seeing that an excavation in a sidewalk which he has made for such vault, is guarded with ordinary care. Hence, where such an ex-

cavation was made originally by the lot owner himself, the law imposes on him the personal duty of guarding it with ordinary care, which duty cannot be shifted to an independent contractor by letting to him a contract to construct the walls of the vault and to finish the job; but if such contractor or his servants negligently place a defective covering in a coal hole above the vault and a person falls into it, the lot owner is liable. *HAWVER v. WHALEN* (1892), 49 Ohio St. 69; 29 N. E. 1049; 14 L. R. A. 828.

In several cases the liability of the landowner seems to have been established, partly at least, on the ground that the act of the contractor in rendering the sidewalk unsafe was in violation of a statute or ordinance.³¹ Where a building is being constructed on a city lot and the excavation in the sidewalk is not protected as required by ordinance, the owner of the lot is liable to persons injured by falling therein, although the work is being done by an independent contractor.³² A person injured by falling through a wooden trap-door over an excavation in a sidewalk can, where such coverings are prohibited by an ordinance of the city, recover against the owner of the premises, notwithstanding the fact that a few days before the accident such owner employed a carpenter, who was an independent contractor, to repair the door and the negligence of the latter contributed to the accident.³³

On the other hand, it has been held that a landowner, who makes a contract with another person to provide the

lamp over a sidewalk and permitted its fastenings to become decayed, so that it was knocked down by the negligence of a contractor in repairing it, injuring a foot passenger, he could not escape payment of damages on the ground that the contractor was not his servant, and that he himself has been guilty of no personal negligence. *Tarry v. Ashton* (1876), 1 Q. B. D. 314. See, also, *Gleeson v. Railroad Co.* (1890), 140 U. S. 435; 11 Sup. Ct. Rep. 859.

³¹ See Sec. 69, *ante*.

³² *Spence v. Schultz* (1894), 103 Cal. 208; 37 Pac. 220; *Crenshaw v. Ullman* (1893), 113 Mo. 633; 20 S. W. 1077; *Savannah, etc.,*

Railroad v. Phillips (1892), 90 Ga. 829; 17 S. E. 82; *LANCASTER v. INSURANCE Co.* (1887), 92 Mo. 460; 5 S. W. 23; 1 Amer. St. Rep. 739; *Wood, Mast. & S., pp.* 621-624; *KETCHAM v. NEWMAN* (1894), 141 N. Y. 205; 36 N. E. 197; 24 L. R. A. 102; *SMITH v. TRADERS EXCHANGE* (1895), 91 Wisc. 360; 64 N. W. 1041; 51 Amer. St. Rep. 912; 30 L. R. A. 504; *Taylor, etc., Railroad v. Warner* (1895), 88 Tex. Civ. App. 642; 31 S. W. 66; 32 S. W. 868; *HOLE v. SITTINGBOURNE RAILROAD Co.* (1861), 6 Hurl. & N. 488; 7 Am. Neg. R. 157, n.

³³ *BARRY v. TERKILDSEN* (1887), 72 Cal. 254; 13 Pac. 657; 1 Amer. St. Rep. 55.

So also, as to dangerous conditions other than excavations. Thus, the owner was held liable where the contractor for brick-work on a building failed to erect barricades to prevent injuries to persons on the sidewalk from falling materials.²⁹ The defendants, property owners, when they erected their awning over the sidewalk in front of their store were said, in a recent Tennessee case, to have "assumed all the obligations of the city to the public, and something more. It was their duty to exercise a high degree of care and diligence in the construction, maintenance, inspection and repair of the awning, so as to prevent it from obstructing the street, or endangering those using it; and their failure to do so, or to take proper precautions to protect the public at all times from injury in any way growing out of its maintenance or repair, renders them liable for the damages suffered." ³⁰

to make the sidewalk safe for pedestrians. *Benjamin v. Metropolitan Street Railroad Co.* (1896), 133 Mo. 274; 34 S. W. 590. The owner of a building cannot shift the duty under which he stands to adjoining owners, or to passers-by on the sidewalk or street, of keeping his building in repair, by committing the repair of it, after a fire, to an insurance company, which has reserved in a policy the right to repair in case of a fire. *STEPPE v. ALTER* (1896), 48 La. Ann. 363; 19 So. 147; 55 Amer. St. Rep. 281.

²⁹ *Young et al. v. Trapp* (1904), 118 Ky. 813; 82 S. W. 429. The New York Court of Appeals holds that the employer is liable if the work itself creates a dangerous condition, and that an abutting owner for whom an independent

contractor was constructing a wall in the rear of his premises was liable for an injury to a person, caused by a raised flagstone in the driveway at its intersection with the sidewalk, where the flagging was raised by the contractor's heavily loaded wagons. *Mullins v. Siegel, Cooper Co.* (1905), 183 N. Y. 129; 75 N. E. 1112, on appeal from 88 N. Y. Supp. 377.

³⁰ *McHARGE v. NEWCOMER* (1907), 117 Tenn. 595; 100 S. W. 700; 9 L. R. A. (N. S.), 298, citing *Robbins v. Chicago* (1866), 4 Wall. (U. S.), 657; *JEFFERSON v. CHAPMAN* (1889), 127 Ills. 433; 20 N. E. 33; 11 Amer. St. Rep. 139; *HAWVER v. WHALEN* (1892), 49 Ohio St. 69; 29 N. E. 1049; 14 L. R. A. 828. When a person, for his own profit, suspended a

of the building, alongside which the excavation was made, having caused the work to be done by virtue of a license granted by the city, were bound to use every reasonable care that such privilege's exercise should not become a nuisance or produce injury, failing in which such owner was liable.³⁶ In a later case, recovery was denied for injury received by a person falling into an unguarded, unlighted excavation dug under a footpath. The court said the earlier doctrine was not binding because the question of the employer's liability for the contractor's negligence was not really involved, the action being by the former to recover from the latter, damages he had had to pay the injured person.³⁷

It has been held that no action was maintainable where a fence built around an excavation in the sidewalk was

jured by falling thereon. *Larow v. Clute* (1891), 60 Hun, 580; 14 N. Y. Supp. 616.

³⁶ *Silvers v. Nerdlinger* (1868), 30 Ind. 53.

³⁷ *RYAN v. CURRAN* (1878), 64 Ind. 345; 31 Amer. Rep. 123. "This view of the decision is clearly erroneous, as the only ground on which the action could be maintained is that the employer was himself primarily liable for the negligence of the contractor." Note to *JACOBS v. FULLER, ETC., Co.* (1902, Ohio), in 68 L. R. A. 846; 13 Am. Neg. R. 208. Judge Thompson in his *Commentaries on Negligence* pronounces this latter Indiana decision as "seemingly unsound." *Ryan v. Curran* has been followed in *Cummins v. City of Seymour* (1881), 79 Ind. 491; *Wabash, etc., Railroad v. Farver* (1887), 111

Ind. 195; 31 Am. & Eng. R. Cas. 134; *Dooley v. Town of Sullivan* (1887), 112 Ind. 451, in which the former holding is qualified to the extent that "it is quite clear that to fasten a liability on the town it must be shown that the work was intrinsically dangerous, or that the town authorities had notice of the danger, or were negligent in not acquiring notice;" followed in *City of Evansville v. Senhenn* (1897), 151 Ind. 42; 47 N. E. 634; 51 N. E. 88; 41 L. R. A. 728; 68 Amer. St. Rep. 218; *Park v. Board, etc.* (1891), 3 Ind. App. 538; 30 N. E. 147, holding a county liable as to a bridge rendered defective by a contractor, but overruled as to county's liability in *Board, etc., v. Allman* (1895), 142 Ind. 593; *Zimmerman v. Baur* (1894), 11 Ind. App. 607.

materials and construct a sidewalk in front of his premises, retaining no power to direct the manner of doing the work and retaining no control or right of control over the contractor in the performance of the contract in any respect, except that the work shall be in compliance with the contract, is not liable for an injury caused by stones and other obstructions negligently left in the street by the contractor.³⁴ So also, a landowner was held not liable to a passerby for an injury caused by a building contractor's negligence in allowing brick and mortar to fall from the wall.³⁵ In an early Indiana case it was held that owners

³⁴ *Independence v. Slack* (1895), 134 Mo. 66; 34 S. W. 1094. Defendant, owning city property, employed F. & B. on terms making them independent contractors to build a cement sidewalk fronting her property, which they did. Sometime thereafter the sidewalk broke and defendant called on them to repair it, without pay, to which they objected but which they ultimately did, defendant giving no directions except to point out the place to repair. In repairing it, they left unguarded, unlighted obstructions on the sidewalk, and plaintiff, passing along at night, was injured. The court instructed the jury to find against the defendant and for the contractors. On appeal the former was sustained and the judgment in favor of F. & B. was reversed. The court expressly follows the rule in *Robbins v. Chicago* (1866), 4 Wall. (U. S.), 678; *KAUPMAN v. ROTHWELL* (1908, Tex.), 109 S. W. 1089; 17 L. R. A. (N. S.), 258, citing

inter alia *CHESAPEAKE, ETC., CO. v. ALLEGHANY CO.* (1881), 57 Md. 201; 40 Amer. Rep. 430. On the other hand, an abutting owner for whom an independent contractor constructed a cement sidewalk, was held not responsible for the latter's negligence in leaving a hole in the planking that he placed over the newly constructed walk. *Massey v. Oates* (1905), 143 Ala. 248; 39 So. 142.

³⁵ *Pye v. Faxon* (1892), 156 Mass. 471; 31 N. E. 640. The employer was held not to be responsible where a servant of a contractor or a subcontractor caused injury to a person on the adjacent street or rightfully on the premises, by letting fall a brick. *Wolf v. American Tract Society* (1898), 15 App. Div. 98; 49 N. Y. Supp. 236. If one engages a contractor to pump water from a cellar, and the latter's servants do so negligently, whereby ice is formed on the sidewalk, the owner is not liable to one in-

dangerous excavation in the street and failed to properly guard the same for the protection of the traveling public, generally on the principle that where work to be done necessarily constitutes an obstruction or defect in the street which renders it dangerous to travelers, unless properly guarded or shut off from public use, the principal for whom the work is done can not defeat a just claim for damages by proving that the work which constituted the defect or obstruction was the work of an independent contractor.⁴¹ If the contract provides for doing work in the street itself, such as making water and sewer connections and the like, then as to such work the owner may be liable.⁴² A prop-

⁴¹ *Robbins v. Chicago* (1866), 4 Wall. (U. S.), 657, 678; *Chicago v. Robbins* (1862), 2 Black (U. S.), 418; *Baltimore v. O'Donnell* (1879), 53 Md. 110; 36 Amer. Rep. 395; *Circleville v. Neuding* (1885), 41 Ohio St. 465; *Houston, etc., Railroad v. Meador* (1878), 50 Tex. 77; *Logansport v. Dick* (1880), 70 Ind. 65; 36 Amer. Rep. 166; *Birmingham v. McCrary* (1887), 84 Ala. 469; 4 So. 630; 27 Cent. L. J. 598; *Detroit v. Cory* (1861), 9 Mich. 165; 80 Amer. Dec. 78; *Storrs v. Utica* (1858), 17 N. Y. 104; 72 Amer. Dec. 437; *Curtis v. Kiley* (1891), 153 Mass. 123; 26 N. E. 421; *Burd. C. Torts*, 403; to the contrary, *Fuller v. Citizens Bank* (1882), 15 Fed. 875, which Judge Thompson characterizes as an "ill-considered case." *Thomps. Neg.*, Sec. 653, note 25; also *Cf.*, *Moline v. McKinnie* (1888), 30 Ills. App. 419.

⁴² *Spence v. Schultz* (1894), 103 Cal. 208; 37 Pac. 220; *Wiggin v.*

St. Louis (1896), 135 Mo. 558; 37 S. W. 528; *Thomas v. Harrington* (1903), 72 N. H. 45; 54 Atl. 285; 65 L. R. A. 742; 16 Am. Neg. R. 608, n; *Southern Ohio Railroad v. Morey* (1890), 47 Ohio St. 207; 24 N. E. 269; 7 L. R. A. 701; 43 Am. & Eng. R. Cas. 97; *Hawver v. Whalen* (1892), 49 Ohio St. 69; 29 N. E. 1049; 14 L. R. A. 828; *McCarrier v. Hollister* (1903), 15 S. Dak. 366; 89 N. W. 862; 91 Amer. St. Rep. 695; 11 Amer. Neg. R. 641. That the proprietor will be liable for the failure of his contractor to safeguard an excavation in a street, see, in addition to the foregoing cases, *Fisher v. Tryon* (1898), 15 Ohio C. C. 541; *Murphy v. Perlstein* (1902), 76 N. Y. Supp. 657; *Ann v. Herter* (1903), 79 N. Y. Supp. 825. Letting work which involves a dangerous excavation in a public highway to an independent contractor will not absolve the principal from liability for injuries

blown down and struck a passerby; the court saying: "The structure being lawful, all the acts necessary to be done in completing it were collateral to the undertaking. If the fence was insufficient, or if the contractor went beyond the permit in obstructing the street, these acts are to be chargeable to the persons who did them."³⁸ Where the owner of premises having occasion to construct an improvement in his cellar which is required by the board of health, employs a contractor, who is bound to do all work and furnish all materials, the employer is not liable for injuries to a pedestrian from colliding with a barrel placed over an open coal hole in the sidewalk, and kept there by the contractor to supply necessary ventilation for the prosecution of the work.³⁹

Sec. 93. Same, Regarding Highways.

The rule of liability for safety of premises extends to the protection of users of a highway against defective overhanging structures.⁴⁰ The principle of holding an owner liable for work dangerous *per se*, has often been applied so as to charge a proprietor with liability for damages to a traveler in consequence of one who has contracted with the proprietor to do work on his premises, having made a

³⁸ *Martin v. Tribune Association* (1883), 30 Hun (N. Y.), 291.

³⁹ *Maltbie v. Bolting* (1893), 6 Misc. 339; 26 N. Y. Supp. 903. Liability of the employer was denied where the injury was caused by a truckman's negligence in rolling barrels out of his employer's store. *Riedel v. Moran, etc., Co.* (1894), 103 Mich. 262; 61 N. W. 509. In an action against a lot owner for personal injuries received from a defect in a side-

walk, it was declared that the defendant ought to be allowed to introduce evidence to show that independent contractors were in possession and control of the premises, and that the defendant had no notice of the defect. *Ster v. Tuety* (1887), 45 Hun (N. Y.), 49.

⁴⁰ *Huff. Agcy.*, 2d ed., Sec. 225, citing *Tarry v. Ashton* (1876), 1 Q. B. D. 314; 7 Am. Neg. R. 157, n.

jured.⁴⁵ Thus, a landowner employing a carpenter at a given price to alter a building and to furnish all material therefor, is not liable to a third person injured by driving on material deposited on the highway adjoining the land by the contractor's teamster, intended for use in making the alterations.⁴⁶ A landowner is not liable for an injury to a passerby caused by a plank, attached to a scaffolding by a roofer, being blown down by the wind.⁴⁷ Persons employed to build a railway for a street car company negligently stretched a wire rope across a street, the manner of doing the work having been left to such persons, and the company was held not liable.⁴⁸

⁴⁵ *Frassi v. McDonald* (1898), 122 Cal. 400; 55 Pac. 139; *Hoff v. Shockley* (1904), 122 Iowa, 729; 98 N. W. 573; 101 Amer. St. Rep. 289; 64 L. R. A. 538; 16 Amer. Neg. R. 607, n; *Strauss v. Louisville* (1900), 108 Ky. 155; 55 S. W. 1075, where plaintiff was injured by the contractor's servant throwing a piece of lime into a mortar bed placed in the street. *Boomer v. Wilbur* (1899), 176 Mass. 482; 57 N. E. 1004; 53 L. R. A. 172; 8 Amer. Neg. R. 246; *Emmerson v. Fay* (1896), 94 Va. 60; 26 S. E. 386; *Richmond v. Sitterding* (1903), 101 Va. 354; 43 S. E. 562; 99 Amer. St. Rep. 879; 65 L. R. A. 445; 16 Am. Neg. R. 609, n.; *Smith v. Milwaukee, etc., Exchange* (1905), 91 Wisc. 360; 64 N. W. 1041; 51 Amer. St. Rep. 912; 30 L. R. A. 504.

⁴⁶ *Hilliard v. Richardson* (1855), 3 Gray, 349; 63 Amer. Dec. 743. The owner of land who employs an independent con-

tractor to erect or repair a building on his lot, is not liable for injuries resulting from the contractor's deposit of planks in the highway or other negligence on the part of the contractor or his servants. *McCarthy v. Second Parish* (1880), 71 Me. 318; 36 Amer. Rep. 320; *Forsyth v. Hooper* (1865), 11 Allen (Mass.), 419; *Pearson v. Cox* (1877), 2 C. P. Div. 369, cited in *Tiff. Dom. Rels.*, 510. The employer is not liable to third persons for injuries to one coming in contact with timbers dragged through the streets by an independent contractor, to be used in erecting a building. *Doran v. Flood* (1891), 47 Fed. 543.

⁴⁷ *Hexamer v. Webb* (1896), 101 N. Y. 377; 54 Amer. Rep. 703; 4 N. E. 755.

⁴⁸ *Sanford v. Pawtucket St. R. Co.* (1896), 19 R. I. 537; 35 Atl. 67; 33 L. R. A. 564; 4 Amer. & Eng. Railroad Cas. (N. S.), 318. Where a proprietor of a house

erty owner can not relieve himself from liability for injuries to a traveler on a highway by reason of the negligent failure to guard and light, after dark, a trench opened in the highway, to connect his dwelling with the street water main, by employing an independent contractor to do the work.⁴³ On the other hand, it has been asserted that if an owner pursuant to a building contract commits the entire care and control of the premises to the contractor, he will not be liable to a traveler injured by an unguarded excavation in the street.⁴⁴

Where an owner contracts for the erection or repair of a building upon his lot, he is generally held not liable for the acts or negligence of the contractor or his servants in obstructing the street or in permitting objects to fall into the street whereby those lawfully using the street are in-

to a traveler, caused by the negligent act of the contractor in failing to maintain proper guards. *CAMERON, ETC., CO. v. ANDERSON* (1904), 98 Tex. 156; 81 S. W. 282; 1 L. R. A. (N. S.), 198; 16 Am. Neg. R. 599, 608. The plaintiff was held entitled to recover on the ground that the ditches which caused his injuries had been left open and unguarded by the contractor. *Baxter v. Warner* (1876), 6 Hun (N. Y.), 585. Cf., *BLAKE v. FERRIS* (1851), 5 N. Y. 48; 55 Amer. Dec. 304; *STORRS v. UTICA* (1858), 17 N. Y. 104; 72 Am. Dec. 437.

⁴³ *THOMAS v. HARRINGTON* (1903), 72 N. H. 45; 54 Atl. 285; 65 L. R. A. 742; 16 Am. Neg. R. 608, n.

⁴⁴ *Allen v. Willard* (1868), 57

Pa. St. 374; *ERIE v. CAULKINS* (1877), 85 Pa. St. 247; 27 Amer. Rep. 642; *SCAMMON v. CHICAGO* (1861), 25 Ills. 424; 79 Amer. Dec. 334; 14 Am. Neg. Cas. 418, n.; *Pfau v. Williamson* (1873), 63 Ills. 16; *Ryder v. Thomas* (1878), 13 Hun (N. Y.), 296. *Contra*, *Chicago v. Robbins* (1862), 2 Black (U. S.), 418; *Robbins v. Chicago* (1866), 4 Wall. (U. S.), 567. In the absence of an express or implied authorization, one who employs a contractor to repair a levee near a highway does not become responsible for an injury caused by an excavation made in the highway by removing dirt therefrom. *Andrews v. Runyon* (1884), 65 Cal. 629; 4 Pac. 669. For additional cases, see 65 L. R. A. 652.

let fall a brick upon a person passing by." And in reply to the argument that it is "unreasonable that one who has work to perform, that he himself can not perform from want of knowledge or skill, should be held liable for the negligence of one whom he employed to do it, since, if he did reserve control, it would avail nothing, from his own want of knowledge and skill," the court said: "There is seeming force in this, but only so. It is not agreeable to the principles of distributive justice; for it is equally a hardship that one should suffer loss by the negligent performance of work that another procured to be done for his own benefit, and which he in no way promoted, and over which he had no control. Hence, where work is to be done that may endanger others, there is no real hardship in holding the party, for whom it is done, responsible for neglect in doing it. Though he may not be able to do it himself, or intelligently supervise it, he will nevertheless be the more careful in selecting an agent to act for him. This is a duty which arises in all cases where an agent is employed, and no harm can come from stimulating its exercise in the employment of an independent contractor where the rights of others are concerned." ⁵⁰

But upon the sale of a house standing upon the vendor's land to a suitable person for the purpose of removing same within a reasonable time, and surrendering possession and control thereof to such vendee, the house itself being in a safe condition capable of being removed without danger to anyone, neither the vendee nor his agents while engaged in moving the property sold are the vendor's servants for whose careless conduct the vendor can be held liable under the doctrine of *respondeat superior*.⁵¹

⁵⁰ COVINGTON V. STEIN Brock (1899), 61 Ohio St. 215; 55 N. E. 618; 76 Amer. St. Rep. 375; 7 Am. Neg. R. 154.

⁵¹ WILMOT V. MCPADDEN (1906), 76 Conn. 367; 65 Atl. 157; 19 L. R. A. (N. S.), 1101.

Sec. 94. Same, Removing Condemned Buildings.

Whether a landowner, notified by public authorities to remove a condemned building, can relieve himself from liability for improperly doing so by engaging a third person to do it, is variously decided.⁴⁹ A property owner, who had been ordered by the inspector of buildings to remove the walls of a ruined building, as a nuisance to the public as well as to adjoining property, let the job of removal to an independent contractor who had agreed to save the owner harmless for injuries done to others in the performance of the contract. Plaintiff was injured through the negligence of the contractor and his servants. The court held the owner liable for the injury on the ground that "the doing of the work necessarily involved danger to others, unless great care was used, and the injury resulted from negligence in doing the work. It was not collateral to the employment, as would have been the case, had a servant of the contractor, while at work, negligently

contracted with a builder to execute certain repairs and the builder made a subcontract for the plaster work, it was held that neither the proprietor nor the principal contractor was liable for injuries caused by the upsetting of a vehicle which resulted from the negligence of the subcontractor in leaving a heap of lime in the street, without any fence or protection, outside the space which had been duly set apart, fenced in and lighted by the principal contractor, in accordance with the provisions of a police act. *McLean v. Russell* (1850), 12 Scotch Sess. Cas., 2d series, 887. See, also, *Reagan v.*

Casey (1894), 160 Mass. 374; 36 N. E. 58. A railroad company was held liable for injuries caused by an obstruction erected in the highway by a contractor engaged in constructing the road, in *Deming v. Terminal R. Co.* (1900), 63 N. Y. Supp. 615.

⁴⁹That he may, see *Earl v. Beadleston* (1877), 10 Jones & S. (N. Y.), 294; *Butler v. Hunter* (1862), 7 Hurl. & N. 825; 8 Am. Neg. R. 301, n. *Contra*, *Brown v. Werner* (1873), 40 Md. 15; *Bower v. Peate* (1876), 1 Q. B. D. 321; 11 Am. Neg. R. 645. See, also, *Dillon v. Hunt* (1884), 82 Mo. 150.

a dangerous condition by a fire, and the owner employed a contractor to take them down, and in consequence of his negligence in doing the work the walls fell on adjoining property, the owner was held liable on the ground that "When a party is under a duty to the public or a third person to see that work he is about to do or have done is carefully performed, so as to avoid injury to others, he can not, by letting it to a contractor, avoid his liability, in case it is negligently done to the injury of another."⁵⁵ A landowner was held liable for the negligence of a contractor in permitting fire to escape to adjacent lands from lands which he had contracted to clear and make ready for the plow, where such negligence flowed directly from the acts which the contractor agreed to do and was by the land-

where the work has been let to a contractor although he may have told such contractor to make the building a certain width, rendering it necessary to encroach on adjoining premises to excavate for the foundation; the owner is bound to know the width of his lot, and if he becomes a party to any encroachment upon his neighbor's premises whereby, as here, his neighbor's house is injured or destroyed, he is a co-trespasser and is as responsible as though he himself made the excavation. *Williamson v. Fisher* (1872), 52 Mo. 198. "Perhaps the exception is even broader than this. In one case it is stated, by way of dictum, to be this: 'If a contractor faithfully performs his contract, and a third person is injured by the contractor, in the course of its due performance, or by its result, the employer is liable, for

he causes the precise act to be done which occasions the injury.'" Huff. Agcy., 2d ed., Sec. 220, citing *Lawrence v. Shipman* (1873), 39 Conn. 586.

⁵⁵*COVINGTON, ETC., Co. v. STEIN-BROCK* (1899), 61 Ohio St. 215, 223; 55 N. E. 618; 76 Amer. St. Rep. 375; 7 Am. Neg. R. 154. Cf., *Duer v. Consolidated Gas Co.* (1903), 86 App. Div. (N. Y.), 14; 38 N. Y. Supp. 714. Where the owner of a house which has been burned leaves the walls thereof standing in an unsafe and tottering condition, he is liable to an adjoining owner for damages caused by its fall on the latter's building, and it is no defense that the premises were in the sole charge of a skillful contractor under contract to rebuild the house. *SESSENGUT v. POSEY* (1879), 67 Ind. 408; 33 Amer. Rep. 98. See Sec. 92, note 28.

Sec. 95. Same, as to Adjoining Owners.

The decisions as to the liability of property owners to adjoining owners due to work being done upon or in connection with the property of the former owners by independent contractors or their servants, are at great variance with each other, and no general rule as to this particular relation may safely be asserted. On the one hand, it is stated by Judge Thompson:⁵² "One who is causing a building to be erected on his own lands, stands under the legal duty of supporting the land or building (*quacre?*) of his neighbor, or voluntarily assumes that duty, and if he negligently fails to perform it, so that the land caves in or the building falls down, he must answer in damages to its proprietor, although he may have committed the work to an independent contractor and left him to his own method."⁵³ The employment of an independent contractor to make an excavation adjoining the premises of another does not relieve the proprietor from the obligation to take reasonable precautions to prevent injury to his adjoining proprietor."⁵⁴ Where the walls of a building were left in

⁵² Thomps. Neg., Sec. 654.

⁵³ Citing *Bower v. Peate* (1876), 1 Q. B. D. 321; 11 Am. Neg. R. 645; *Cohen v. Simmons* (1892), 66 Hun (N. Y.), 634; 21 N. Y. Supp. 385; *LARSON v. METROPOLITAN STREET RAILROAD* (1892), 110 Mo. 234; 19 S. W. 416; 16 L. R. A. 330; 45 Alb. Law. J. 514; 34 Cent. Law J. 513; 33 Amer. St. Rep. 439.

⁵⁴ Citing *Samuel v. Novak* (1904), 99 Md. 558; 58 Atl. 19; *DAVIS v. SUMMERFIELD* (1903), 133 N. C. 325; 45 S. E. 654; 63 L. R. A. 492; 92 Amer. St. Rep. 781; 16 Am. Neg. R. 611, n., hold-

ing plaintiff entitled to notice. Where a contractor, to whom had been intrusted the work of rebuilding a tenement in which a prescriptive easement of lateral support had been acquired by the owner of the adjoining tenement, executed the work so negligently as to cause the subsidence of an arch in the vault of the latter tenement and a bulging of the walls of the vault, the owner was held liable. *LeMaitre v. Davis* (1881), L. R., 19 Ch. Div. 281. It is error to instruct that one who contracts for the erection of a building is not responsible

On the other hand, it is said that, if in a building contract, the excavating is so negligently done as to injure adjoining premises, the owner is not liable, if the plans, etc., furnished the contractor are sufficient to secure a safe construction of the building and the erection of the building was not naturally dangerous to adjoining property.⁵⁸ Persons contracting for the erection of buildings have been held not responsible where the excavation for the building was so negligently made as to injure a building on the adjoining land.⁵⁹ If a carpenter is employed at a stated price to repair a house, furnishing all material and labor, and the house falls down through the negligence or unskillfulness of the contractor, to the injury of another's property, the employer, it is held, is not answerable.⁶⁰

"In dealing with this subject, it should be kept carefully in view that a proprietor who employs an independent contractor to work on his land is not at all liable for any tres-

⁵⁸ Crenshaw v. Ullman (1893), 113 Mo. 633; 20 S. W. 1077.

⁵⁹ Aston v. Nolan (1883), 63 Cal. 269; Crenshaw v. Ullman, *supra*; Harrison v. Kiser (1887), 79 Ga. 588; 4 S. E. 320. A landowner is not answerable where a sub-contractor so carelessly executed a contract for the removal of certain earth and rock from the defendant's vacant lot that a stable belonging to an adjoining landowner was injured. King v. Livermore (1876), 9 Hun (N. Y.), 298, affirmed (1877), 71 N. Y. 605.

⁶⁰ Connors v. Hennessey (1873), 112 Mass. 96. Liability has been denied in a case where a pile of lumber was so negligently erected by a contractor that it toppled over and fell into an adjoining

lot, thereby causing a man's death. Andrews v. Boedecker (1885), 17 Ills. App. 213; 9 Amer. St. Rep. 649. In a case where the workmen of one who had contracted with the defendant to erect a building carried away some bricks and other materials belonging to the buildings of a person who owned the adjacent land, it was held error to instruct the jury that if they were "of the opinion that the workmen while they were on the land by the defendant's permission, had from the want of due care injured the plaintiff's property, or had carried away the plaintiff's materials, the defendant would be liable for those acts." Gayford v. Nicholls (1854), 9 Exch. 702.

owner authorized to do, and which was the natural and probable consequence of the performance of the work in the manner agreed upon.⁵⁶ Where a property owner employed a contractor to blast within a few feet of the house of an adjoining owner and took no precautions against resulting injuries, the proprietor was held liable.⁵⁷

⁵⁶ *Cameron v. Oberlin* (1897), 19 Ind. App. 142; 48 N. E. 386. If a proprietor employs a contractor to construct a drain from his cellar into the common sewer in the street, through a plank barrier beneath the surface of the street, which surrounds the block of buildings in which the cellar is situated, and the work is so negligently and improperly done that, after it is finished, tide water flows through the opening made in the barrier into the plaintiff's cellar, the proprietor employing the contractor to do the work is liable for the damages thereby inflicted upon the plaintiff; in the view of the court, the doctrine of independent contractor does not apply to such a case; "but where the thing contracted to be done, from its nature, creates a nuisance, or where, being improperly done, it creates a nuisance and causes mischief to a third person, the employer is liable for it." *STURGES V. THEOLOGICAL, ETC., SOCIETY* (1881), 130 Mass. 414; 39 Amer. Rep. 463. An abutting owner who obtains from the city authority to grade the street, and contracts with an independent contractor to grade such street, and his lots, was held liable for the dumping

into a ravine by the contractor, with his knowledge and procurement, of mud and quicksand which overflowed another's land several hundred feet distant, although permission was obtained of the intervening owners to overflow their lots. *Koch v. Sackman, etc., Co.* (1894), 9 Wash. 405; 37 Pac. 703. Where the owner of shore land contracted with another to dredge in front of it and deposit the dredging on the rear, and failed to provide means to prevent it from sliding on to the land of an adjoining owner, he was held liable. *Braisted v. Brooklyn, etc., R. Co.* (1899), 61 N. Y. Supp. 674.

⁵⁷ *WETHERBEE V. PARTRIDGE* (1899), 175 Mass. 185; 55 N. E. 894; 78 Amer. St. Rep. 486. Where defendant's contractor, in working on his building negligently raised excessive dust, broke into a chimney throwing soot and rubbish down it so as unnecessarily to damage the business and goods of the occupant of the adjoining premises, the plaintiff was held entitled to recover. *Cameron v. Fraser* (1881), 9 Sc. Sess. Cas., 4th series, 26, a somewhat doubtful decision.

ployer to supervise the work being done under an independent contract is sometimes predicated specifically with respect to work which involves the performance of absolute duties incumbent on the employer.⁶⁵ The existence of the duty of supervision is occasionally inferred from the terms of some statutory provision which regulates the performance of the work in question.⁶⁶ The duty in question may be the result, express or implied, of the contract itself; thus, on the ground that it was provided in the contract for the erection of a building that partitions, etc., were to be taken down or filled up as might be required and anchored where directed, it was held that the directions were to be given by the owners.⁶⁷

That an employer is not bound to supervise the progress of work contracted to be done for him by an independent contractor, for the purpose of preventing the commission of collateral torts by either the contractor or his servants, has been frequently declared.⁶⁸ "The doctrine relieving the employer from the necessity of supervising the work

⁶⁵ *O'Brien v. Board, etc.* (1880), 6 Vict. L. Rep. 204; *Williams v. Tripp* (1878), 11 R. I. 447.

⁶⁶ *Chicago v. Dermody* (1871), 61 Ills. 431; 14 Am. Neg. Cas. 418, n.; *ANDERSON v. FLEMING* (1903), 160 Ind. 597; 67 N. E. 443; 66 L. R. A. 119; 16 Am. Neg. R. 606, n. It is clear that in certain cases the law virtually declares that the employer must, at his peril, see that the work is executed with reasonable care. *HOLE v. SITTINGBOURNE, etc.*, R. (1861), 6 Hurls. & N. 488, per Pollock, B.; *Dalton v. Angus* (1881), L. R., App. Cas. 829, per Blackburn, J.

⁶⁷ *LANCASTER v. CONNECTICUT, etc., Co.* (1887), 92 Mo. 1; 5 S. W. 23; 1 Amer. St. Rep. 739.

⁶⁸ *Braidwood v. Bonnington, etc., Co.* (1866), 2 Scot. L. Rep. 152, in which the defendants were held not liable for the negligent supervision of an inspector whom the defendant employers had sent; *Woods v. Trinity Parish* (1893), 21 D. C. 540, where a contractor left a shutter in a church tower insecure and the society was excused; *Aldritt v. Gillette, etc., Co.* (1902), 85 Minn. 206; 88 N. W. 741, case of a subcontractor; *Hawke v. Brown* (1898), 28 App. Div. (N. Y.), 37; 50 N. Y. Supp.

passes upon the property of others which the contractor may permit in doing the work, on the theory of *respondeat superior*; since the contractor is neither his agent nor his servant in the sense of this rule. The mere fact then that the independent contractor commits such a trespass while acting within, what might be called, the scope of his employment (*i. e.*, while acting in carrying out the contract), does not at all tend to charge the proprietor with liability, unless the contract expressly or by fair implication, authorizes the contractor to commit the trespass.”⁶¹

Sec. 96. Same, Condition of Premises, Generally.

If owners are charged with the duty of keeping premises, such as a mine, safe, they are liable though independent contractors are to employ such premises (in this instance, to take out the ore).⁶² For a discussion of the liability of the owner of premises for damages resulting from a so-called “attractive nuisance” (analogous to the turn-table cases) created by the independent contractor, see the recent case cited below.⁶³

Sec. 97. Same, Duty to Supervise.

Judge Thompson declares: “It has been well laid down that, if the building of a house is split up into several different contracts, and the owner undertakes to supply the materials and no provision is made for the supervision of the work, or for maintaining guards, the duty of protecting the public remains on the owner.”⁶⁴ The duty of an em-

⁶¹ *Davison v. Shanahan* (1892), 93 Mich. 486; 53 N. W. 624; *Andrews v. Runyon* (1884), 65 Cal. 629; 4 Pac. 669.

⁶² *LAKE SUPERIOR, ETC., Co. v. ERICKSON* (1878), 39 Mich. 492; 33 Amer. Rep. 423; *Kelly v. Howell* (1884), 41 Ohio St. 438.

⁶³ *WILMOT v. MCPADDEN* (1906), 78 Conn. 276; 61 Atl. 1069; 79 Conn. 367; 65 Atl. 157, and note thereto in 19 L. R. A. (N. S.), 1094, *et seq.*

⁶⁴ *Thomp. Neg.*, Sec. 657, citing *HOMAN v. STANLEY* (1870), 66 Pa. St. 464; 5 Amer. Rep. 389.

ground that the work is under the exclusive control of a contractor.⁷⁰ When the owner of premises, which are under his control, employs an independent contractor to do work upon them, which from its nature, is likely to render the premises dangerous to persons who may come upon them by the invitation of the owner, the owner is not relieved, by reason of the contract, from the obligation of seeing that due care is used to protect such persons. The owner can not continue to hold out the invitation without being bound to exercise due care in keeping the premises reasonably safe for use according to the invitation.⁷¹

Sec. 99. Same, Furnishing Appliances.

A proprietor, who engages with a contractor to paint his building, the proprietor to furnish the staging for that purpose, is under an implied warranty to furnish a safe staging for that purpose; and if the staging breaks, injuring the contractor or his servants, the proprietor must pay damages, notwithstanding the staging was built for him by

⁷⁰ Huff. Agcy., 2d ed., Sec. 225, citing *CURTIS v. KILEY* (1891), 153 Mass. 123; 23 N. E. 421; Burd. Cas. Torts, 403; *COUGHTRY v. GLOBE WOOLEN CO.* (1874), 56 N. Y. 124; 15 Amer. Rep. 337. Cf., *Stewart v. Putnam* (1879), 127 Mass. 403; *STURGES v. THEOLOGICAL, ETC., SOCIETY* (1831), 130 Mass. 414; 39 Amer. Rep. 463; *WOODMAN v. METROPOLITAN RAILROAD* (1889), 149 Mass. 335; 21 N. E. 482; 4 L. R. A. 213; 14 Amer. St. Rep. 427; 6 Rail. & Corp. Law J. 72; 12 Am. Neg. Cas. 80.

⁷¹ *CURTIS v. KILEY*, *supra*. On

the ground that the operations contemplated were not such as necessarily involved injury to visitors, it was held that the owner of a pleasure resort and street railway leading to it, did not, by leasing the privilege of operating a switchback railway at the resort, and advertising it as one of the attractions of the place, become an insurer against accidents to persons patronizing the lessee, or become liable for his carelessness. *KNOTTNERUS v. NORTH, ETC., STEAMSHIP CO.* (1892), 93 Mich. 348; 53 N. W. 529; 17 L. R. A. 726.

may be regarded as one which is deducible directly from the legal conception of an independent contractor, as being essentially a person, who, *ex hypothesi*, is entitled to exercise his own discretion with regard to the manner in which the results which he has undertaken to produce shall be achieved; or it may be put upon the ground that the employer is entitled to act upon the presumption that a contractor, who has been carefully selected, will exercise reasonable skill and prudence in executing the stipulated work."⁶⁹

Sec. 98. Same, Duties as to Invitees.

If the owner of property contracts for work to be done upon it, he is, as to invitees, bound to keep the premises in a safe condition and can not excuse himself on the

1032, holding there was no duty to employ a supervising architect; *Boardman v. Creighton* (1901), 95 Me. 154; 49 Atl. 363, that an employer is not to be held liable simply by alleging it was his duty to examine the work from time to time. Through a subcontractor's negligence, water flowed into plaintiff's cellar. The court held that the principal contractor was not liable as he was under no obligation by his contract to give any direction as to this portion of the work, and had no control or authority over the mode or manner of its performance but only a right to insist generally that the work be done according to the terms of the con-

tract. *Slater v. Mersereau* (1876), 64 N. Y. 138.

⁶⁹ Note to *SALLIOTTE v. KING, ETC., Co.* (1903), 58 C. C. A. 466; 122 Fed. 378, in 65 L. R. A. 620, 636. The presumption is that "directions were given to do the work in the ordinary way, and to take all the proper precautions not to cause any mischief." *Pollock, C. B., in Butler v. Hunter* (1862), 7 Hurl. & N. 826. To the same effect, *EATON v. EUROPEAN, ETC., R.* (1871), 59 Me. 520; 8 Amer. Rep. 430; *CARTER v. BERLIN MILLS* (1876), 58 N. H. 52; 42 Amer. Rep. 572; *City of Independence v. Slack* (1895), 134 Mo. 66; 34 S. W. 1094.

the erection of a building thereon, and employes a competent architect to draw the plans and specifications and to supervise the work, and a competent contractor to construct the foundation and building, is not responsible for an accident caused by the defective execution of the plan by the contractor and the failure of the architect carefully to inspect the work. These persons are regarded as in the exercise of an independent calling."⁷⁵ Where alterations in a building were being made by a contractor, and a wall, weakened by age and decay, fell and injured a third person, the owner was not liable, for the work was considered not intrinsically dangerous, and could have been done with safety had due care been used.⁷⁶ "The principle, upon which

137 N. Y. 100; 32 N. E. 1052; 33 Amer. St. Rep. 695; *Vanderpool v. Husson* (1858), 28 Barb. (N. Y.), 196; *Deford v. State* (1863), 30 Md. 179; *CLARK v. FRY* (1858), 8 Ohio St. 358; 72 Amer. Dec. 590.

⁷⁵ *White's Supp. to Thomps. Neg.*, p. 92, citing *Bjornsen v. Saccone* (1899), 88 Ills. App. 6; *Geist v. Rothschild* (1900), 90 Ills. App. 324; *Murray v. Arthur* (1901), 98 Ills. App. 331; *Callahan v. Philips Academy* (1901), 180 Mass. 183; 62 N. E. 360; *Eldred v. Mackie* (1901), 178 Mass. 1; 59 N. E. 673; *Burns v. McDonald* (1894), 57 Mo. App. 599, plumber; *Korn v. Weir* (1904), 88 N. Y. Supp. 976; 16 Am. Neg. R. 611, n.; *Nelson v. Young* (1904), 87 N. Y. Supp. 69; *Southwestern Telephone Co. v. Paris* (1905), 39 Tex. Civ. App. 424; 87 S. W. 724; *RICHMOND v. SITTERDING* (1903), 101 Va. 354; 43 S. E. 562; 99 Amer. St. Rep. 879; 65 L. R. A. 445; *Burke v.*

Ireland (1901), 166 N. Y. 305; 59 N. E. 914.

⁷⁶ *ENGEL v. EUREKA CLUB* (1893), 137 N. Y. 100; 32 N. E. 1052; 33 Amer. St. Rep. 695. "The rule applicable to buildings which are being reconstructed or repaired is in no way different from that which prevails with respect to buildings under construction;" note to *SALLIOTTE v. KING, ETC., Co.* (1903, 58 C. C. A. 466, 122 Fed. 378), in 65 L. R. A. 649. See cases cited in said note under (7). One owning a building being constructed is held not liable for the negligence of an independent contractor's servant in leaving a stone in a dangerous position so that it fell and injured one using the adjacent sidewalk, though the matter of barricading the walk or taking other precautions does not seem to have been considered. *Johnson v. Helbing* (1907), 6 Cal. App. 424; 92 Pac. 360.

another independent contractor, for by accepting it from such contractor he adopts it as his own.⁷²

Sec. 100. Building Contracts, Generally.

The early case of *BUSH v. STEINMAN*⁷³ carried the doctrine of liability of a landowner for the safe condition of his premises, to the extreme point of holding that, where work is done on an owner's premises, he ought to reserve control over the methods, and if he does not, is liable for all results. It is generally agreed, at the present time, that a landowner will not be liable for the negligence of an independent contractor or that of his servants in constructing a building, unless the work is inherently dangerous, or its nature is such that in letting it the owner commits to the contractor some absolute duty resting on him as owner of the property.⁷⁴ "A property owner, who undertakes

⁷² *Mulchey v. Methodist, etc., Society* (1878), 125 Mass. 487; 15 Am. Neg. Cas. 661, n.; 6 Reporter, 751. The case was also likened to that class of cases wherein the proprietor of realty is held liable to pay damages to any one who, invited to come upon his premises, is injured by a latent defect therein. *Indemaur v. Dames* (1866), 1 C. P. 274; *ELLIOTT v. PRAY* (1865), 10 Allen (Mass.), 378; 87 Am. Dec. 653; *Gilbert v. Nagle* (1875), 118 Mass. 278; *Pickard v. Smith* (1861), 10 C. B. (N. S.), 470; 7 Am. Neg. R. 158, n.; 8 Id. 264, n.; *Holmes v. Northeastern R.* (1869), L. R., 4 Exch. 254; 9 Am. Neg. R. 569, n.; *COUGHTRY v. GLOBE, etc., Co.* (1874), 56 N. Y. 154; 15 Amer. Rep. 387.

⁷³ (1799), 1 B. & P. 404, reported herein, Sec. 48, *ante*. As already shown, the case of *BUSH v. STEINMAN* has been unfavorably commented on in this connection in England and America, and is probably not now law. *REEDIE v. LONDON, etc., R.* (1849), 4 Exch. 244, 246; 6 Eng. Rail. & Corp. Cas. 184; *Pollock on Torts*, 5th ed. p. 76, note *h*; *BLAKE v. FERRIS* (1851), 5 N. Y. 48, 62-64; 55 Amer. Dec. 304; see, also, *Strauss v. City of Louisville* (1900), 108 Ky. 155; 55 S. W. 1075.

⁷⁴ *Robinson v. Webb* (1875), 11 Bush (Ky.), 464; *ERIE v. CAULKINS* (1877), 85 Pa. St. 247; 27 Amer. Rep. 642; *Ryder v. Thomas* (1878), 13 Hun, 206; *Gilbert v. Beach* (1855), 16 N. Y. 606; *ENGEL v. EUREKA CLUB* (1893),

the fact that a derrick furnished to a contractor for the purpose of unloading railway iron was permitted by him to get into a defective and dangerous condition.⁸¹

Sec. 103. Same, Party Walls.

"It is the general duty of the owner of premises to keep the walls of his building in a safe condition, so that they will not endanger his neighbor by falling; and if he negligently omits its performance and his neighbor is injured, the injury is actionable."⁸² Where a proprietor has an easement of support in a party wall as where it had been erected at the joint expense of both the coterminous land-owners, or by their common vendor, then if one disturbs it to the other's injury, he does so at his peril, whether he does the work personally or by an independent contractor.⁸³ Where damages are caused to an adjoining proprietor by the breach of duty of a house owner to rebuild with reasonable dispatch a party wall, which he had had taken down, such damages are imputable to him, even though he has employed a competent architect and builder, and though they are responsible for the negligence, if any, which caused the delay.⁸⁴ But it is said that the work of raising a party wall is neither dangerous nor extraordinary in itself, so as to make the person for whom it is done liable for the negligence of an independent contractor in doing the work.⁸⁵

Sec. 104. Same, Removing Dangerous Wall.

Where a building or a structure is in such a condition that it is liable to fall during the process of removing it or

⁸¹ *KING v. RAILWAY CO.* (1876), 66 N. Y. 181; 23 Amer. Rep. 37.

⁸² *ENGEL v. EUREKA CLUB* (1893) 137 N. Y. 100; 32 N. E. 1052; 33 Amer. St. Rep. 692, citing *MULLEN v. ST. JOHN* (1874), 57 N. Y. 567; 15 Amer. Rep. 530, in which, however, the

evidence showed the negligence was that of the contractor and not of the owner.

⁸³ *Thomps. Neg.*, Sec. 1125, and cases cited.

⁸⁴ *Joliffe v. Woodhouse* (1894, C. A.), 10 Times L. R. 553.

⁸⁵ *NEGUS v. BECKER* (1894), 143

the rights and liabilities of the owners of property upon which work is being done by independent contractors rest, is well settled and uniformly recognized. It is founded on wisdom and sound policy. The limitations which have been put upon the immunity from liability are also settled. The application of the exceptions has given rise to much discussion and frequently to some conflict in the views of the court." ⁷⁷

Sec. 101. Same, Relation, How Shown,

In a joint action against the owner of a building, the contractor and subcontractor, for an injury to the employee of the latter, the contracts and specifications between the owner and the contractor were held properly admitted to show the relation of the defendants to one another. ⁷⁸

Sec. 102. Same, Management of Machinery.

A building owner is not liable for injuries caused by an independent contractor's servant improperly managing a hoisting apparatus furnished in a reasonably safe condition by such building owner. ⁷⁹ A street railway company is not liable for injuries received by a child, who was drawn into a machine used for the manufacture of concrete, by one who had contracted for the building of the road. ⁸⁰ Nor is a railway company liable for injuries resulting from

⁷⁷ *YOUNG v. FOSBURG LUMBER Co.* (1908, N. C.), 60 S. E. 654; 16 L. R. A. (N. S.), 259.

⁷⁸ *Pioneer, etc., Co. v. Howell* (1901), 189 Ills. 123; 59 N. E. 535.

⁷⁹ *Piette v. Bavarian Brewing Co.* (1892), 91 Mich. 605; 52 N. W. 152; 13 Am. Neg. Cas. 53, n. Where plaintiff's property was injured by the fall of a derrick used in the construction of a

building under an independent contract, the owner of the building was held not liable. *Prairie, etc., Co. v. Doig* (1873), 70 Ills. 52.

⁸⁰ *Chicago, etc., R. v. Hennessey* (1884), 16 Ills. App. 153. To the same effect where a child's hand was caught in a pulley used by a contractor in stringing telephone wires. *Vosbeck v. Kellogg* (1899), 78 Minn. 176; 80 N. W. 957.

Sec. 106. Landlord and Tenant, Generally.

In answer to the question whether a landlord, in making repairs on the demised premises during the term, will be allowed to shift the responsibility for an injury to the tenant, upon an independent contractor who may be insolvent, some courts hold that he will not and others that he will. In some jurisdictions where the landlord employs an independent contractor to make repairs, it is held that he is not liable for injuries resulting from the negligence of such contractor in making the repairs, where no negligence is shown by reason of the employment of the particular contractor.⁹⁰ The owner is not made liable for the negligence of the contractor resulting in injury to a tenant's family in a building in course of reparation because of his

628; 51 N. Y. Supp. 433; *Neumeister v. Eggers* (1899), 29 App. Div. (N. Y.), 385; 51 N. Y. Supp. 481. In fact, the fatal result of such negligence does not appear to have been the subject of much discussion, in distinguishing such cases from those ordinarily arising as to the employer's liability for his contractor's negligence.

⁹⁰ 24 Cyc., 1117, citing, in addition to cases referred to *infra*, *Jefferson v. Jameson, etc., Co.* (1897), 165 Ills. 138; 46 N. E. 272, reversing 60 Ills. App. 587; *Turner v. McCarty* (—), 4 E. D. Smith (N. Y.), 247; *Sterger v. Van Siclen* (—), 7 N. Y. Supp. 805. "See, however, *O'Rourke v. Feist* (1899), 59 N. Y. Supp. 157; *Worthington v. Parker* (1885), 11 Daly (N. Y.), 545; *Sulzbacker v. Dickie* (1876), 6 Daly (N. Y.), 469; *Blake v. Fox* (1892), 17 N. Y. Supp. 508. See, also, *Mills v. Holton* (—), 2 Hurl. & N. 14."

Where, through the negligence of an independent contractor in failing to take measures to insure the safety of the tenants while the work of building or repairing is in progress, an injury happens to a tenant and the contractor is not under any control of the landlord, except as to the result to be attained, and the tenant is hurt through the act of the contractor, *e. g.*, in leaving an excavation unguarded, the landlord will not be liable. *Wiese v. Remme* (1897), 140 Mo. 289; 41 S. W. 797; 3 Am. Neg. R. 222. A landlord was exonerated from liability to a tenant for an injury caused by the fall of plaster where an employee of the independent contractor, engaged in repairing the house, slipped his foot and went through the ceiling, although the plaster was out of repair and might have fallen later of its own accord. The proximate cause of the dam-

tearing it down, the owner of it is not relieved from liability to one who is injured in consequence of its so falling by the fact that the work of tearing it down and removing it had been committed to an independent contractor.⁸⁶ The owner of a building, who employs a contractor to remove walls which have become dangerous, is liable for the negligence of the contractor in performing the work, whereby a third person is injured, the same as though the contractor were his servant.⁸⁷ The owner of a chimney was held liable for its fall, although he had hired an independent contractor to inspect it, who had pronounced it safe.⁸⁸

Sec. 105. Same, Exempt Though Fatal.

The employer has been held not liable in a number of cases where the injuries caused by the independent contractor's negligence proved fatal.⁸⁹

N. Y. 303; 38 N. E. 290; 25 L. R. A. 667; 45 Amer. St. Rep. 724. As to party walls and similar cases, see *KETCHAM v. NEWMAN* (1894), 141 N. Y. 205; 36 N. E. 197; 24 L. R. A. 102; *Bower v. Peate* (1876), 1 Q. B. D. 321; 16 Am. Neg. R. 645.

⁸⁶ *ENGEL v. EUREKA CLUB*, 59 Hun (N. Y.), 593; 14 N. Y. Supp. 184; (1893), 137 N. Y. 100; 32 N. E. 1052; 33 Amer. St. Rep. 695.

⁸⁷ *Steinbrock v. Covington, etc., Co.* (1897), 4 Ohio (N. P.), 229; 6 Ohio Dec. 328; *Northern Trust Co. v. Palmer* (1898), 70 Ills. App. 93; 56 N. E. 796; 3 Am. Neg. R. 531.

⁸⁸ *CORK v. BLOSSOM* (1894), 162 Mass. 330; 38 N. E. 495; 26 L. R. A. 256; 44 Amer. St. Rep. 362. A property owner employed an independent contractor to repair certain chimneys, by taking off a

few feet and relaying the brick. Such work, the court declared, was not such as would necessarily endanger persons in the street. It did not involve throwing brick into the street, or causing or allowing them to fall so as to endanger persons traveling therein. The negligence of the contractor's servants in handling bricks was a mere detail of the work. The work itself could not be classed as dangerous. Any negligence of the contractor's servants was merely collateral to the work and did not render the property owner liable. *BOOMER v. WILBUR* (1900), 176 Mass. 482; 57 N. E. 1004; 53 L. R. A. 172; 8 Am. Neg. R. 246, cited in *Burd. Torts*, p. 141.

⁸⁹ *Doran v. Flood* (1891), 47 Fed. 543; *Thornton v. Lennon* (1898), 29 App. Div. (N. Y.),

and whose goods are injured as a result of the manner in which a man contracting with the landlord for the removal of the adjoining house performed his work, can not recover from the landlord.⁹⁵

"The better view is that a landlord, who undertakes to make repairs on the demised premises during the term, is liable for damages to the person or property of the tenant resulting from the negligence of those whom he may engage to make the repairs, although they are employed by the job, and without reference to the question whether the landlord is under an agreement with the tenant to make the repairs or not."⁹⁶ A landlord was held liable to his

tion of the work, the former is liable. *Eblin v. Miller* (1880), 78 Ky. 371; *Wiese v. Remme* (1897), 140 Mass. 289; 41 S. W. 797; *Morton v. Thurber* (1881), 85 N. Y. 550; *Boss v. Jarmulowsky*, *supra*; *Mahon v. Burns* (1894), 29 N. Y. Supp. 682; 34 Id. 91; *O'Connor v. Schnepel* (1895), 33 N. Y. Supp. 562; *Rotter v. Goerlitz* (1890), 12 N. Y. Supp. 210; *Meany v. Abbott* (1867), 6 Phila. (Pa.), 256. A landlord is not liable, under an implied covenant of quiet enjoyment, for injuries to the personal property of a tenant caused by the tortious acts of the servants of an independent contractor for a one story extension to the building, while using a part of the demised premises as a means of access to their work. *Hyde v. Wilmore* (1895), 35 N. Y. Supp. 681.

⁹⁵ *ROTTER v. GOERLITZ* (1890), 16 Daly, 484; 12 N. Y. Supp. 210.

⁹⁶ *Thomps. Neg.*, Sec. 1142, 1148, citing *Houston, etc., R. v. Meador* (1878), 50 Tex. 77. *Contra*, Las-

ker, *etc.*, *Association v. Hatcher* (Tex. Civ. App., 1894), 28 S. W. 404. "In other jurisdictions, however, it is held that the landlord in making repairs and improvements to demised premises owes a duty of reasonable care to the occupying tenants, which he can not escape by placing the work with an independent contractor, especially if the work to be done is attended with danger to the tenant." 24 Cyc. 1117, citing *inter alia*, *NAHM v. REGISTER NEWSPAPER Co.* (1895), 120 Ky. 485; 87 S. W. 296; 9 Amer. & Eng. Ann. Cas. 211; *Curtis v. Kiley* (1891), 153 Mass. 123; 26 N. E. 421; *PEERLESS MANUFACTURING Co. v. BAGLEY* (1901), 126 Mich. 225; 85 N. W. 568; 86 Amer. St. Rep. 537; 53 L. R. A. 285; *Dorse v. Fisher* (—), 10 Ohio Dec. (reprint), 163; *Wilber v. Follansbee* (1897), 97 Wisc. 577; 72 N. W. 741; 73 Id. 559; *WERTHEIMER v. SAUNDERS* (1897), 95 Wisc. 573; 70 N. W. 824; 37 L. R. A. 146.

failure to obtain the tenant's consent to enter the premises.⁹¹ The general rule is, that a lessor is not liable to a servant of the lessee for damages resulting from the latter's negligence unless some duty remained upon the lessor from a failure to perform which the injury occurred.⁹² A New York court has recently held a landlord not liable for the negligence of an independent contractor in permitting material to remain in a hallway.⁹³ "The general rule is, that where a landlord lets the work of repairing his building to another, to be done by the latter as an independent contractor, and the landlord selects such a person as a man of ordinary prudence and care would employ to do the work, the relation of master and servant is not created, and the landlord is not liable to the tenant for the negligence or improper execution of the work, or responsible for the carelessness or negligence of the contractor in its performance."⁹⁴ A tenant, whose premises are exposed

age was deemed to be the act of the contractor's employee in putting his foot through the ceiling and not the landlord's negligence. *Fitzgerald v. Timoney* (1895), 34 N. Y. Supp. 460. So, also, where damage was caused to a tenant by the falling of soot down a chimney upon the demised premises, where the accident was alleged to be due to the negligence of a contractor who was working upon the chimney, making no claim that it was the landlord's duty to use diligence to prevent such an accident. *O'Connor v. Schnepel* (1895), 33 N. Y. Supp. 562.

⁹¹ *McDermott v. McDonald* (1894), 55 Ills. App. 226. A landlord was held not to be liable in an action for damages brought by

the parents of a child who fell into a privy vault which a contractor had dug on the demised property and left unclosed for several months. *Wiese v. Remme* (1897), 140 Mo. 289; 41 S. W. 797; 3 Am. Neg. R. 222.

⁹² *CRUSSELLE v. PUGH* (1881), 67 Ga. 430; 44 Amer. Rep. 724.

⁹³ *Boss v. Jarmulowsky* (1903), 81 N. Y. Supp. 400.

⁹⁴ Note to *NAHM v. REGISTER, ETC., Co.* (1905, 120 Ky. 485, 87 S. W. 296), in 9 Am. & Eng. Ann. Cas. 211, citing *Blake v. Woolf* (1898), 2 Q. B. 426; *Lawrence v. Shipman* (1873), 39 Conn. 536; *Mumby v. Bowden* (1839), 125 Fla. 454; 6 So. 453, holding, however, that where it appears that the landlord and not the contractor had the control and direc-

Sec. 108. Same, Personally Supervising.

Although the landlord may call in, to do certain work, a competent contractor, yet if he personally supervises the work and it is improperly done and the tenant is thereby damaged, the landlord will be liable; *e. g.*, where he called in a competent tinsmith to replace defective pipes conducting water from the roof, and through the manner in which the work was done, the goods of the tenant were injured by leakage.¹⁰⁰

Sec. 109. Same, Work Imminently Dangerous.

Although the landlord may stipulate with the contractor for a certain result only, without reserving any control over the contractor as to his methods of achieving that result, yet if the result itself is imminently dangerous, in consequence of which an injury accrues to the tenants of the landlord, the latter will be liable; *e. g.*, the landlord of a tenement house was held liable to a tenant for the falling of a dumb waiter, gratuitously supplied by him for the convenience of the tenants, whose fall was due to the negligent splicing of the ropes supporting it, although the person who did the splicing was an independent contractor.¹⁰¹ A Kentucky court has recently held that a landlord erecting additional stories on a building occupied by a tenant will not be relieved from liability for injuries to the stock of a tenant by falling rain merely because the work is being

(1895), 147 N. Y. 715; 42 N. E. 722. Where a shed belonging to a livery stable keeper, intended for receiving carriages, was blown down by a high wind while being erected by an independent contractor, whereby plaintiff's carriages, which had been placed in the lower story after its completion, were injured, it was held

that the plaintiff was properly non-suited and that the defendant had exercised ordinary care, all that the law required. *Searle v. Laverick* (1874), L. R., 9 Q. B. 122.

¹⁰⁰ *Worthington v. Parker* (1885), 11 Daly (N. Y.), 545.

¹⁰¹ *Blake v. Fox* (1892), 17 N. Y. Supp. 508.

tenants for damages sustained by them from the weather, in consequence of the act of the contractor, whom he had employed to repair the building, in leaving it unroofed, without covering.⁹⁷

Sec. 107. Same, Discharging Legal Duty.

"Where a landlord is under a legal duty to make repairs, and he employs an independent contractor to do the work, and as a result of the contractor's negligence the tenant suffers damages, the landlord can not escape by showing that he employed an independent contractor, over whom he had no control, to make the repairs for him."⁹⁸ A landlord who employs a contractor to make certain repairs which he is *bound* to make is liable for injuries caused to a tenant by the failure of the contractor to execute the work; as where a tenant fell through a defective bridge between an apartment house and another building.⁹⁹

⁹⁷ *Sulzbacker v. Dickie* (1876), 6 Daly (N. Y.), 469. But see other New York cases, *supra*, holding contrary. An intermediate Pennsylvania court holds a landlord responsible to his tenant for an injury arising from the negligence of a plumber in improperly constructing a water tank on the leased premises. *Meany v. Abbott* (1857), 6 Phila. (Penn.), 256. The landlord was held liable for injuries to a tenant where no contract had been let to the mechanic engaging in making the repairs, in *Anderson v. Moore* (1903), 108 Ills. App. 106.

⁹⁸ Note to *NAHM v. REGISTER, ETC., CO.* (1905, 120 Ky. 485), in 9 Am. & Eng. Annot. Cas., p. 212, citing *PEERLESS, ETC., CO. v. BAGLEY* (1901), 126 Mich. 225; 85 N.

W. 568; 86 Amer. St. Rep. 537; 53 L. R. A. 285; *O'Rourke v. Feist* (1899), 42 N. Y. App. Div. 136; 59 N. Y. Supp. 157; *Randolph v. Feist* (1898), 52 N. Y. Supp. 109; *Sulzbacker v. Dickie* (1876), 51 How. Pr. (N. Y.), 500; *Worthington v. Parker* (1885), 11 Daly (N. Y.), 545; *CURTIS v. KILEY* (1891), 153 Mass. 123; 26 N. E. 421; *Burd. Cas. Torts*, 403; *PITTSFIELD, ETC., CO. v. PITTSFIELD, ETC., CO.* (1902), 71 N. H. 522; 53 Atl. 807; 60 L. R. A. 116; *Jefferson v. Jameson, etc., Co.* (1897), 165 Ills. 138; 46 N. E. 272.

⁹⁹ *Brennan v. Ellis* (1893), 70 Hun, 472; 24 N. Y. Supp. 426. The same rule applies where the work or material is that furnished by a subcontractor. *Butts v. Mackey Co.* (1893), 72 Hun (N. Y.), 562; 25 N. Y. Supp. 531. Cf.

Sec. 110. Master's Non-assignable Duty.

If a master delegates the performance of a primary and non-assignable duty, which such master owes to his own servant, to an independent contractor, the rule which exonerates a proprietor from responsibility for the negligence of an independent contractor ceases to obtain, but the contractor becomes with respect to the performance of such duties the vice-principal and representative of the master, and the master is liable to his servant for the negligence of the contractor in failing to perform them, or in the manner of performing them.¹⁰⁵

¹⁰⁵ *North Chicago Street R. v. Dudgeon* (1900), 83 Ills. App. 528; 183 Ills. 477; 56 N. E. 596, railway company employing an independent contractor to repair its tracks; *WOODMAN v. METROPOLITAN R. Co.* (1889), 149 Mass. 339; 21 N. E. 482; 4 L. R. A. 213; 6 Rail. & Corp. Law J. 72; 14 Amer. St. Rep. 427; 12 Am. Neg. Cas. 80, a street obstructed by an independent contractor in the performance of a contract with the proprietor; *Sackewitz v. American, etc., Co.* (1899), 78 Mo. App. 144; *Johnston v. Phoenix, etc., Co.* (1901), 60 N. Y. Supp. 947; 169 N. Y. 581; *MORAN v. CORLISS, etc., Co.* (1899), 21 R. I. 386; 43 Atl. 874; 45 L. R. A. 267, master delegated to an independent contractor the duty of keeping a crane operated by electricity in a safe condition for the use of his employees and he negligently failed to perform it, in consequence of which an employee was injured; *Water Co. v. Ware*

(1872), 16 Wall. (U. S.), 566; *Toledo, etc., Co. v. Bosch* (1900), 41 C. C. A. 482; 101 Fed. 530; *Stewart v. Ferguson* (1899), 60 N. Y. Supp. 429, employer directed another to perform a statutory duty of such employer, of erecting a safe scaffolding whereon his employees were to work; *McIntyre v. Boston, etc., R.* (1895), 163 Mass. 189; 39 N. E. 1012; *Pennsylvania Railroad Co. v. LaRue* (1897), 81 Fed. 148; 27 C. C. A. 363; *BUSHBY v. NEW YORK, etc., R.* (1887), 107 N. Y. 374; 14 N. E. 407; 1 Amer. St. Rep. 844. For decisions more or less *contra*, see *Bemisch v. Roberts* (1891), 143 Pa. St. 1; 21 Atl. 998; *Mansfield, etc., Co. v. McEnery* (1879), 91 Penn. St. 185; *Fraser v. Red River, etc., Co.* (1891), 45 Minn. 235; 47 N. W. 785, scaffold; *Devlin v. Smith* (1882), 25 Hun (N. Y.), 206; 89 N. Y. 476; 42 Amer. Rep. 311, scaffold; *Baird v. Dunn* (1895), 33 New Bruns. 156.

done by an independent contractor.¹⁰² A Michigan court held the landlord liable for the negligence of an independent contractor installing an automatic sprinkler system, who put in sprinkler heads which fused at too low a temperature and damage to the tenant's goods from the water resulted.¹⁰³ "As a limitation upon the rule (exempting a landlord from liability for acts of an independent contractor) it is held in some cases that, where an act voluntarily undertaken by a landlord in repairing his building is one from its very nature liable to damage his tenant, the landlord is not released from responsibility to a tenant damaged thereby, although the landlord enters into a contract with an independent contractor to perform the work, and the damage occurs through the negligence of the latter."¹⁰⁴

¹⁰² NAHM ET AL. v. REGISTER, ETC., Co. (1905), 120 Ky. 485; 87 S. W. 296; 9 Amer. & Eng. Annot. Cas. 209. Here a landlord, acting without the consent of his tenant, employs an independent contractor to take the roof off of the leased premises for the purpose of adding another story to the building and the landlord was held liable to the tenant for the injury to the latter's goods resulting from the negligent manner in which the work was done.

¹⁰³ PEERLESS MANUFACTURING Co. v. BAGLEY (1901), 126 Mich. 225; 85 N. W. 568; 53 L. R. A. 285; 86 Amer. St. Rep. 537.

¹⁰⁴ Note to NAHM v. REGISTER, ETC., Co., *supra*, 9 Amer. & Eng. Annot. Cas. 212, citing Robbins v. Atkins (1897), 168 Mass. 45; 46 N. E. 425; 1 Am. Neg. R. 617;

Sulzbacker v. Dickie (1876), 51 How. Pr. (N. Y.), 500; Malony v. Bradley (1891), 14 N. Y. Supp. 794; O'Rourke v. Feist (1899), 59 N. Y. Supp. 157; WERTHEIMER v. SAUNDERS (1893), 95 Wisc. 573; 70 N. W. 824; 37 L. R. A. 146; Wilber v. Follansbee (1897), 97 Wisc. 577; 72 N. W. 741; 73 N. W. 559; Lasker, etc., Co. v. Hatcher (1894, Tex. Civ. App.), 28 S. W. 404. Where damage was done to the goods of a tenant by rain which found its way into the building through openings left by an independent contractor while a new roof was being put on, the landlord was held answerable, in Meyers v. Easton (1878), 4 Vict. L. Rep. 283. For other cases involving similar occurrences and sustaining the same rule, see note in 65 L. R. A. 855.

exercising some chartered privilege or power of such corporation with its assent, which he could not have exercised independently of the charter of such corporation."¹ It is a principle of law that, when one is conducting a business the necessary effect of which is to expose others to great danger, so that he ought to take precautions for their safety, he is responsible for the negligence of an independent contractor to whom he intrusts the performance of this duty.² "When a corporation owes a duty, either to its employees or to the public, it can not delegate the performance of that duty to a substitute."³ *Quasi-public* corporations, such as electric light companies, are answerable for the negligence of contractors employed by them in the exercise of any of their charter powers and privileges.⁴

¹ Chicago, etc., Gas Co. v. Myers (1897), 168 Ills. 139; 48 N. E. 46; CHICAGO v. MURDOCK (1904), 212 Ills. 9; 72 N. E. 46; 103 Amer. St. Rep. 221.

² BOUCHER v. NEW YORK, etc., R. (1907, Mass.), 82 N. E. 15; 13 L. R. A. (N. S.), 1177; 50 Am. & Eng. Ry. Cas. 1, citing WOODMAN v. METROPOLITAN R. Co. (1889), 149 Mass. 335; 21 N. E. 482; 4 L. R. A. 213; 14 Amer. St. Rep. 427; 6 Rail. & Corp. Law J. 72; 12 Am. Neg. Cas. 80; CURTIS v. KILEY (1891), 153 Mass. 123; 26 N. E. 421; Burd. Cas. Torts, 403; Blessington v. Boston (1891), 153 Mass. 409; 26 N. E. 1113; Pye v. Faxon (1892), 156 Mass. 471; 31 N. E. 640. "The American reports contain a large number of decisions which are based on the doctrine that a corporation cannot, by delegating to another party the functions which it is empowered to perform, and

which constitute the essential reason for its existence, escape responsibility for injuries caused by the non-performance of such duties as may be attached, either by its charter or by the general law of the state in which it is organized, to the exercise of franchises conferred upon it." Note to ANDERSON v. FLEMING (1903, Ind.), 66 L. R. A. 136, citing cases.

³ Texas, etc., R. v. Juneman (1895), 71 Fed. 939; 18 C. C. A. 394.

⁴ Capital Electric Co. v. Hauswald (1898), 78 Ills. App. 359. The rule of liability was held to apply where a servant of a contractor engaged in work on an elevated railroad, dropped a heavy piece of steel on a person passing under the structure. Metropolitan, etc., R. v. Dick (1900), 87 Ills. App. 40.

CHAPTER V.

EMPLOYER'S EXCEPTIONAL LIABILITY—II. CHARACTER OF OBLIGATION—(CONTINUED).

SECTION	SECTION
115. Franchise rights, generally.	129. Same—Liability as warehousemen.
116. Railroad companies, generally.	130. Street railroads.
117. Same—Delegating operation of road.	131. Carriers' duty, generally.
118. Same—Contractor operating road.	132. Same—Safe premises.
119. Same—Contractor in control at time of injury.	133. Same—Safe vehicles, etc.
120. Same—Contractor negligently managing construction train.	134. Same—Safe tracks, etc.
121. Same—Presumption as to direction by employer.	135. Same—Sleepers, etc.
122. Same—Contractor killing cattle.	136. Same—Special contract as to freight.
123. Same—Contractor failing to fence.	137. Same—As to running trains.
124. Same—Contractor or servant trespassing.	138. Same—As to criminal acts.
125. Same—Duty to traveler as to excavations.	139. Cities and towns, generally.
126. Same—Lessee operating road.	140. Same—Jointly with contractor.
127. Same—Trustee operating road.	141. Same—Safety of streets.
128. Same—Using tracks in common.	142. Same—Constructing sewers.
	143. Same—Grading street.
	144. Same—As to bridges.
	145. Same—Necessity as to notice.
	146. Same—Contractor's trespasses.
	147. Counties.
	148. Public utility companies.
	149. Public charities.
	150. Public exhibitions.
	151. Profit corporations.

Sec. 115. Franchise Rights, Generally.

“Even though the person, who causes the injury, is a contractor, he will be regarded as the servant or agent of the corporation for which he is doing the work, if he is ex-

company to them is one which does not require, for its lawful performance, the aid of any franchise vested in the company, the rule will be different and the company will not be responsible for the negligence or wrong of the contractor (or lessee) in performing it, unless such responsibility would attach to any other proprietor under similar circumstances.”⁶ “If a railroad is built properly,” says a Georgia court, “we do not think any nuisance will result from the building. The company, under its charter, had authority of law to do this work; and when it contracted with the construction company, it was, of course, implied that the latter would do the work in a lawful and proper manner.”⁷

⁶ *Thomps. Neg.*, Sec. 669, citing in note 109, *West v. St. Louis, etc., R.* (1872), 63 Ills. 545; *SANFORD v. PAWTUCKET ST. R.*, *supra*. “Cf., *Toledo Street R. v. Conroy* (1890), 39 Ills. App. 351, where the doctrine is inaccurately stated.” In a Massachusetts case which distinctly overruled *BUSH v. STEINMAN* (*ante*, Sec. 48), the court said: “The case, then, of *LOWELL v. BOSTON, ETC., R.* (1839), 23 Pick. 24; 34 Amer. Dec. 33, stands perfectly well upon its own principles, and is clearly distinguishable from the case at bar. The court might well say that the fact of N., being a contractor for this section, did not relieve the corporation from the duties or responsibility imposed on them by their charter and the law, especially as the failure to replace the barriers was the act of their immediate servant acting under their orders.” *HILLIARD v. RICHARDSON* (1855), 3 Gray (Mass.), 353; 63 Amer. Dec. 743.

⁷ *ATLANTA, ETC., RAILROAD v. KIMBERLEY* (1891), 87 Ga. 161; 13 S. E. 277; 27 Amer. St. Rep. 231, in which the declaration alleged that the defendant had made a deep cut while its road was being constructed, and had deposited the earth taken out in such manner as to dam up a small stream and form a pond near the plaintiff's house; that the defendant had placed near the house a convict camp used in constructing the road, and permitted the filth accumulating in the camp sinks to flow out and be deposited near the house, whereby the house became infected with malaria, etc. A railroad company was held liable for an injury caused by an attack by a vicious steer, although it had made an independent contract with another to remove and kill injured animals. *Texas, etc., R. v. Juneman* (1895), 71 Fed. 939; 30 U. S. App. 541; 18 C. C. A. 249.

Sec. 116. Railroad Companies, Generally.

The general rule of non-liability has usually been applied so as to exempt railroads from liability for wrongs done by contractors employed by them to construct and repair their roads.⁵ "The true distinction in these cases is, that, where the wrongful act is done by contractors or lessees of a railroad corporation in pursuance of the special powers and privileges conferred upon it, by its charter, or by the applicatory general law, and that but for such charter or general enabling statute they would have no right to prosecute the particular business, such contractors or lessees are regarded as servants of the company, and acting under its direction for the purpose of conserving the rights of third parties. But that the act which is committed by the

⁵ Clark v. Hannibal, etc., R. (1865), 36 Mo. 202; Meyer v. Midland R. (1873), 2 Nebr. 319; Central Railroad v. Grant (1872), 46 Ga. 417; 14 Am. Neg. Cas. 212, n; West v. St. Louis, etc., R. (1872), 63 Ills. 545; Callahan v. Burlington, etc., R. (1867), 23 Iowa, 562; Kansas, etc., R. v. Fitzsimmons (1877), 18 Kans. 34; Tibbetts v. Knox, etc., R. (1873), 62 Me. 437; EATON v. EUROPEAN, ETC., Co. (1871), 59 Me. 520; 8 Amer. Rep. 430; REEDIE v. LONDON, ETC., R. (1849), 4 Exch. 244; 6 Eng. Rail. & Corp. Cas. 184; STEEL v. SOUTHEASTERN RAILROAD (1855), 16 C. B. 550, parol contract; Pawlet v. Rutland, etc., R. (1855), 28 Vt. 297; Schular v. Hudson River R. (1862), 38 Barb. (N. Y.), 653; Hunt v. Pennsylvania Railroad (1866), 51 Penn. St. 475; Clark v. Vermont

Railroad (1854), 28 Vt. 103; McCafferty v. SPUYTEN DUYVIL, ETC., RAILROAD (1874), 61 N. Y. 178; 19 Amer. Rep. 267. *Contra*, STONE v. CHESHIRE RAILROAD (1849), 19 N. H. 427; 51 Amer. Dec. 192; Edmundson v. Pittsburgh, etc., R. (1885), 111 Penn. St. 316; 2 Atl. 404; 23 Am. & Eng. R. Cas. 423. The principle that a railroad company cannot delegate to another its charter rights and privileges, is held not to extend so far as to make the company liable for the negligence of an independent contractor engaged in the construction of its road, in SANFORD v. PAWTUCKET STREET RAILROAD (1898), 19 R. I. 537; 35 Atl. 67; 33 L. R. A. 564; 4 Amer. & Eng. R. Cas. (N. S.), 318; CUNNINGHAM v. INTERNATIONAL RAILROAD (1879), 51 Tex. 503; 32 Amer. Rep. 632.

between a railroad company and a construction company which was doing the work of construction whereby the construction company was allowed to operate the road and to receive its earnings for a certain time, was held not to relieve the railroad company from liability for injuries caused by the negligence of the construction company in carrying passengers; since the construction company operated the road by virtue of the franchise granted by the state to the railroad company, and became in substance and effect, its agents in so doing.¹² A railroad company operating another's road under contract is an "agent" of the owning road under the Michigan Railroad Act (Sec. 43, Comp. Laws, Sec. 1987), and the agent's neglect to erect and maintain fences along the road's line, enjoined by statute, renders the owning road liable for all consequent damages.¹³ In a much litigated Texas case it was first held, that the railroad company was liable where a contractor for the construction of its railway violated the provisions of a statute requiring railway companies to make proper highway crossings and keep them in repair.¹⁴ This was reversed on appeal, the court holding that a charge embodying the theory that the fact that the company's engineer had no authority over the contractor except to see that the road was constructed according to details, conclusively negatives the company's liability,

¹² CHATTANOOGA, ETC., R. v. LIDDELL (1890), 85 Ga. 482; 11 S. E. 853; 8 Rail. & Corp. Law J. 296; 21 Amer. St. Rep. 169; LAKIN v. WILLAMETTE, ETC., R. (1886), 13 Ore. 436; 57 Amer. Rep. 25; 11 Pac. 68.

¹³ Bay City, etc., R. v. Austin (1870), 21 Mich. 390. Cf., GARDNER v. SMITH (1859), 7 Mich. 410; 74 Amer. Dec. 722. That the contractors may be liable over

to the employing company for any damages, does not relieve the corporation from its primary liability in these cases. LESHAR v. WABASH, ETC., CO. (1852), 14 Ills. 85; 56 Amer. Dec. 494; Hinde v. Wabash, etc., Co. (1853), 15 Ills. 72.

¹⁴ Taylor, etc., R. v. Warner (1895), 88 Tex. Civ. App. 642; 31 S. W. 66; 32 Id. 868.

Sec. 117. Same, Delegating Operation of Road.

A railroad company contracting for the moving of its cars by horse power over its own tracks, from one of its depots to the various consignees, is liable for the contractor's negligence, since it could not relieve itself from the liabilities imposed by its charter, by adopting any particular kind of power.⁸ The duty of a railroad company, either by statute or at common law, to maintain gates at a crossing of a crowded street in a great city, can not be delegated to an independent contractor, so as to relieve it from liability for negligence of the gatekeeper which results in injury to a traveler on the highway.⁹ "In leaving railroad cars on the siding in question, the railroad company was exercising its charter powers, which could not be delegated so as to relieve it from responsibility for the negligence of the contractor's employees or defective appliances."¹⁰

Sec. 118. Same, Contractor Operating Road.

Some cases hold that, if a railroad company devolves the execution of its franchise upon contractors, it remains as liable for the latter's acts as though those acts were done by its own servants. It was so held where a chartered railroad company permitted a construction company to use its franchises by running passenger trains over its railway.¹¹ In the case of a railroad in course of construction, a contract

⁸ Philadelphia, etc., R. v. Hahn (1888, Pa.), 12 Atl. 479; 32 Am. & Eng. R. Cas. 24.

⁹ BOUCHER V. NEW YORK, ETC., R. (1907, Mass.), 82 N. E. 15; 13 L. R. A. (N. S.), 1177. For a discussion of the "right of a railroad company to delegate to an independent contractor the maintenance of gates or a flagman at

a street crossing," see note to BOUCHER V. NEW YORK, ETC., R., *supra*, at p. 1177.

¹⁰ Camblin v. Philadelphia, etc., R. (1907), 218 Penn. 54; 66 Atl. 977; 50 Amer. & Eng. R. Cas. (N. S.), 160.

¹¹ Chattanooga, etc., R. v. Whiteland (1892), 89 Ga. 190; 15 S. E. 44.

though the contractor for constructing the road is an incorporated company and operates the road for traffic, since the liability of the railroad company does not attach until it goes into possession and control of the road.¹⁸

Sec. 119. Same, Contractor in Control at Time of Injury.

There is a line of authority to the effect that where a contractor in the construction of a road, was in the exclusive possession thereof, and at the time the injuries were inflicted the railroad company had no control of the road, the railroad company is not responsible for injuries inflicted by the contractor or his employees.¹⁹

work of construction, an independent occupation and was not the agent of the company while discharging the functions incident to that position. *ROME, ETC., R. v. CHASTEEN* (1889), 88 Ala. 591; 7 So. 94; 40 Amer. & Eng. R. Cas. 559. Where an independent contractor engaged in cutting wood for a railroad company owns his own cooking car and it is placed by the company on a spur track to enable the contractor to do his work conveniently, and a fire is communicated from it, causing damage to a third person, the railroad company is not liable. *LEAVITT v. BANGOR, ETC., R.* (1897), 89 Me. 509; 36 Atl. 998; 36 L. R. A. 382; 7 Am. & Eng. R. Cas. 354; 1 Am. Neg. R. 605, criticised in *Thomps. Neg.*, Sec. 656.

¹⁸*Chattanooga, etc., R. v. Whitehead* (1892), 89 Ga. 190; 15 S. E. 44; *Atchison, etc., R. v. Davis* (1885), 24 Kans. 209; 8

Pac. 530; *Kansas Central R. v. Fitzsimmons* (1877), 18 Kans. 34; *Burton v. Galveston, etc., R.* (1884), 61 Tex. 526; 21 Am. & Eng. R. Cas. 218; *Chicago, etc., R. v. Yarbrough* (1896, Tex. Civ. App.), 35 S. W. 422; *Dallas, etc., R. v. Able* (1888), 72 Tex. 150; 9 S. W. 871; 37 Am. Neg. R. Cas. 453.

¹⁹*Kansas Central R. v. Fitzsimmons* (1877), 18 Kans. 34. This was an action for injuries to a child by a turntable used in operating a railroad, which was still in the contractor's possession by whom it was being operated, and used for carrying passengers and freight; an instruction that if the turntable and road were in the possession of and operated by the construction company only, the railroad company was not liable, but if the construction company had possession of the road and was operating it for general purposes, the company was liable for the

was erroneous as not applying to the evidence.¹⁵ On the second appeal, this aspect of the defendant's liability was not commented on, but recovery was allowed on the ground of the company's having exercised a reserved power to select the location of the crossing.¹⁶

On the other hand, it has been held that a railway company is not liable for damages which result through the negligent management of one of its trains, used and controlled by contractors for the construction of its road, in their work of construction on a portion of the road which they have built and not yet turned over to the railway company.¹⁷ So, cases exempt the railroad company, even

¹⁵ Same (1895), 88 Tex. Civ. App. 642; 32 S. W. 868.

¹⁶ Same (1899), 92 Tex. 535; 50 S. W. 120; see, also, same case (1900), 60 S. W. 442.

¹⁷ CUNNINGHAM V. INTERNATIONAL R. Co. (1879), 51 Tex. 503; 32 Amer. Rep. 632; Houston, etc., R. v. Meador (1878), 50 Tex. 77, 87; Houston, etc., R. v. Van Bayless (1876), 1 Wills (Tex. Civ. App.), 247. The principle that a railroad cannot delegate to an employee its charter rights and privileges so as to exempt it from liability, does not extend to the use of the ordinary ways and means for the construction of the road, but to the use of such extraordinary powers only as the company itself could not exercise without having first complied with the conditions of the legislative grant of authority. CUNNINGHAM V. INTERNATIONAL R. Co., *supra*. Where the plaintiff was being conveyed in a caboose on a regular ticket issued by the employees

of a contractor engaged in constructing a railroad and was injured, the railroad was held not liable. Union Pacific Railroad v. House (1871), 1 Wyo. 27. It is error to give a charge to the jury which bases the responsibility of the defendant upon the isolated fact that the contractor was transporting freight and passengers for a reward on a finished portion of the line; for such fact would be insufficient to warrant the inference thus drawn from it, if it should be shown either that the contractor was operating that particular section of the road as a means of furthering the construction of the unfinished part, or that, although the contractor might have been transporting freight and passengers under an arrangement which did not avail to exempt the railroad company from liability for the contractor's negligence, while he was rendering that service, yet he exercised at the same time, in respect to the

bama it is held that a railroad company is responsible in damages for every wrong done by a contractor or subcontractor within the limits of his duty in grading the road-bed of the company, on the ground that such grading is, in conformity to common knowledge, conclusively presumed to have been done pursuant to the direction of the company given through its engineer.²²

Sec. 122. Same, Contractor Killing Cattle.

On the ground that they were trespassers, railroad companies have been held liable to the owners of cattle which were run over and killed by the construction trains used by the contractors in building their roads.²³ An Indiana statute making companies owning railroads liable jointly and severally with the lessees, assignees, receivers, and "other persons running or controlling the road" for stock killed, was held to include contractors, even though employed

²² Alabama, etc., *R. v. Coskey* (1890), 92 Ala. 254; 9 So. 202; Alabama, etc., *R. v. Williams* (1890), 92 Ala. 277; 9 So. 203. In such cases a contractor is regarded as the agent or servant of the corporation employing him if the work involves the exercise of a charter privilege or power of the corporation and which he could not have exercised independently of its charter. *Suburban, etc., R. v. Balkwill* (1900), 94 Ills. App. 454; *Taylor, etc., R. v. Warner, supra* (1900), 60 S. W. 442, Texas. Evidence that defendant's railway was in operation at the time and that a contractor was taking out the old rails and putting in new ones

justified a finding that the defendant was responsible for rails left in the street where there was no evidence offered by the defendant to prove the relation of the contractor to it was an independent one. *Slayton v. West End Street R. Co.* (1899, Mass.), 6 Amer. Neg. Rep. 289.

²³ Illinois, etc., *R. v. Finnigan* (1859), 21 Ills. 645; Chicago, etc., *R. v. Whipple* (1859), 22 Ills. 105. Cf., ILLINOIS, ETC., *R. v. KANOUSE* (1866), 39 Ills. 272; 89 Amer. Dec. 307; Toledo, etc., *R. v. Rumbold* (1866), 40 Ills. 143; *BALSLEY v. ST. LOUIS, ETC., R.* (1886), 119 Ills. 68; 8 N. E. 859; 59 Amer. Rep. 784.

Sec. 120. Same, Contractor Negligently Managing Construction Train.

A railroad company has been held not answerable in damages for the negligent management, by an independent contractor or his servants, of a construction train employed by him in doing the work of constructing; unless it allows the contractor to assume its franchises of carrying passengers.²⁰

Sec. 121. Same, Presumption as to Direction by Employer.

In Texas it is held that the fact that an engineer of a railroad company has no authority over the contractors engaged for the construction of a highway crossing, except to see that it is constructed according to the agreed specifications, does not show that the company itself did not have such control over the contractors as would make the company liable for their negligence in constructing a crossing at a place which was not a public highway.²¹ In Ala-

injuries, was considered erroneous as prejudicial against the railroad company. Judge Brewer, now of the United States Supreme Court, dissented. A railroad company was exonerated from liability for the drowning of a boy in a pool of water formed by a heavy storm against an embankment, constructed by an independent contractor and still in his possession and under his uncompleted contract. *Charlebois v. Gogebic, etc.*, R. (1892), 91 Mich. 59; 51 N. W. 812.

²⁰ *Scarborough v. Alabama, etc., Railroad* (1891), 74 Ala. 497; 10 So. 316; *St. Louis, etc., R. v. Willis* (1888), 38 Kans. 330; 16 Pac. 728; 33 Am. & Eng. Ry. Cas.

(N. S.), 48; *Hitte v. Republican, etc.*, R. (1886), 19 Nebr. 620; 28 N. W. 284; 29 Am. & Eng. R. Cas. 586; *Kansas City, etc., R. v. Fitzsimmons* (1877), 18 Kans. 34. See, also, *Atchison, etc., R. v. Davis* (1885), 34 Kans. 202; 8 Pac. 530; *St. Louis, etc., R. v. Ritz* (1883), 30 Kans. 31; 2 Pac. 27; *McCAFFERTY v. SPUYTEN DUYVIL, etc.*, R. (1874), 61 N. Y. 178; 19 Amer. Rep. 267; *Pawlet v. Rutland, etc., R.* (1855), 23 Vt. 545; and see *ante*, Secs. 117, 118.

²¹ *Taylor, etc., R. v. Warner* (1895), 88 Tex. 642, 648; 31 S. W. 66; 32 Id. 868. Cf., s. c. (1899), 92 Tex. 535; 50 S. W. 120; (1900), 60 S. W. 442.

case that the owner of cattle could not recover as against a railroad company where, owing to the negligence of a contractor in constructing defective stock gaps and throwing down fences, his cattle strayed onto the land adjacent to the track and were injured and killed.²⁷

Sec. 124. Same, Contractor or Servant Trespassing.

Where a corporation has been authorized by law to enter upon certain premises, and take therefrom material for the construction of public works by making compensation therefor, and the corporation afterwards contracts with others to do the work, who avail themselves of the authority given to take material, the corporation will be liable therefor, although the contractors were bound by their contract to furnish the material and do the work for a specified price. Contractors in such cases are deemed servants of the corporation; the work is done by it; and under authority of law; the immunities and liabilities of the charter attach to the company and it will be held accountable.²⁸ And

²⁷ Alabama, etc., *R. v. Martin* (1893), 100 Ala. 511; 14 So. 401. A railroad company was held liable to the lessee of a farm for damages to crops caused by the acts of independent contractors in throwing down fences and failing to erect cattle guards. *Clark v. St. Louis, etc., R. (—, Ark.)*, 44 Amer. & Eng. R. C. (N. S.), 39.

²⁸ *LESHER v. WABASH, ETC., CO.* (1852), 14 Ills. 85; 56 Amer. Dec. 494; *Hinde v. Wabash, etc., Co.* (1853), 15 Ills. 72. The "salutary doctrine" of *LOWELL v. BOSTON, ETC. R.* (1839), 23 Pick. (Mass.), 24; 34 Amer. Dec. 33,

as Judge Thompson calls it in his *Commentaries on Negligence*, Sec. 670, "has frequently been affirmed by other courts." *LESHER v. WABASH, ETC., R.*, *supra*; *Hinde v. Wabash, etc., R.*, *supra*; *OHIO, ETC., R. v. DUNBAR* (1850), 20 Ills. 623; 71 Amer. Dec. 201; *CHICAGO, ETC., R. v. MCCARTHY* (1858), 20 Ills. 385; 71 Amer. Dec. 285; *Illinois, etc., R. v. Finnigan* (1859), 21 Ills. 646; *ILLINOIS, ETC., R. v. KANOUSE* (1866), 39 Ills. 272; 89 Amer. Dec. 307; *Toledo, etc., R. v. Rumbold* (1866), 40 Ills. 143; *Chicago, etc., R. v. Whipple* (1859), 22 Ills. 105; *Carmen v. Steubenville, etc., R.*

by another company, running a train on defendant's tracks, with defendant's consent.²⁴

Sec. 123. Same, Contractor Failing to Fence.

Where there is a public duty resting upon a corporation it can not discharge this duty by any agreement which it may make with an undertaker of the work; thus, a railroad company can not, by a contract with a private person to make openings in its fence for private purposes, relieve itself from its duty to the general public to keep the road securely fenced except at private crossings, and its failure to do so renders it liable for damages resulting to all persons except the contracting person.²⁵ Where a railroad company failed to comply with a statute requiring railway companies and their agents to erect and maintain fences along the line of the road, the employing railroad was declared liable, in a dictum.²⁶ It was held in an Alabama

²⁴ Huey v. Indianapolis, etc., R. (1873), 45 Ind. 320. Compare *ROME, ETC., R. v. CHASTEEN* (1889), 83 Ala. 591; 7 So. 94; 40 Amer. & Eng. R. Cas. 348.

²⁵ *Wabash, etc., R. v. Williamson* (1891), 3 Ind. App. 190; 29 N. E. 455. A railroad does not perform its statutory duty by merely contracting with another person to erect a fence required by the statute, if the performance itself is insufficient. *Gill v. Atlantic, etc., R.* (1875), 27 Ohio S. 240; *Shepard v. Buffalo, etc., R.* (1866), 34 N. Y. 641; *New Albany, etc., R. v. Maiden* (1859), 12 Ind. 10; *Chicago, etc., R. v. Hutchinson* (1891), 45 Kans. 186. That a railway company has employed a contractor to grade its

road bed will not release it from liability for damages caused by its failure to keep up the fences along the right of way, to crops injured by cattle which escaped from such right of way. *Pound v. Port Huron, etc., R.*, (1884), 54 Mich. 13; 19 N. W. 570.

²⁶ *GARDNER v. SMITH* (1859), 7 Mich. 410; 74 Amer. Dec. 722, in which case the contractor's liability was established. An Illinois statute providing for liability for failing to fence railroad tracks within six months after the road was open for use was held to apply where trains were run by the contractors for construction purposes. *Rockford, etc., R. v. Wells* (1872), 66 Ills. 321.

contractor makes a wrongful appropriation of the land of another, it will be no answer to his claim for damages against the railroad company to aver that the appropriation was made by a contractor of the company or by a receiver of such contractor. But if the railroad company adopts the act of the contractor and the receiver in appropriating the land, it must pay a just compensation to the landowner.³⁰ Where contractors employed to construct a railroad, tore down the fences of a proprietor without erecting any temporary barriers, gates or cattle-guards, so that cattle came into his field and destroyed his crops, it was held that the railroad company must answer to him for the damages on the ground that the contractors were exercising the franchises of the company and were its servants.³¹ In cases in which railroad companies are held liable for trespasses committed by independent contractors employed by them, they may be bound to respond therefor in exemplary damages if the trespasses are wanton and malicious.³²

Several American courts hold that railroad companies are not liable for the unauthorized trespasses of independent contractors whom they employ to construct or repair

³⁰ Bloomfield, etc., R. v. Grace (1887), 112 Ind. 128; 13 N. E. 680. On the theory of ratification, a new or reorganized railroad company subscribes to the rights of the old one, must pay for any land appropriated by its predecessor and not paid for by it. Lake Erie, etc., R. v. Griffin (1883), 92 Ind. 487; (1886), 107 Ind. 464; Bloomfield, etc., R. v. Van Slike (1886), 107 Ind. 480. A railroad company is especially liable where after its contractor enters on another's lands, it thereafter uses and occupies the land

so seized in the operation of its railroad. Bloomfield, etc., R. v. Grace, *supra*. If plaintiffs stood by and permitted defendant's contractors to enter on or waste the soil adjacent to defendant's right of way without objection, an equity court may refuse them damages therefor. Murtfelt v. New York, etc., R. (1886), 102 N. Y. 703; 25 Amer. & Eng. R. Cas. 144.

³¹ CHICAGO, ETC., R. v. MCCARTHY (1858), 20 Ills. 385; 71 Amer. Dec. 285.

³² Rockford, etc., R. v. Wells (1872), 66 Ills. 321.

where it appeared from the evidence and the defendant railway company's admissions that the contractors were set to work by the company's agents to clear the right of way and construct its roadbed on land which had not been condemned, the railway company was held liable.²⁹

On any theory of the subject, if the railroad company appropriates the benefit of the trespass, it will be liable to the landowner on the theory of ratification. Thus, if the

(1854), 4 Ohio St. 399; *STONE v. CHESHIRE* R. (1849), 19 N. H. 427; 51 Amer. Dec. 192; *Tarry v. Ashton* (1876), 1 Q. B. D. 314; *BRACKETT v. LUBKE* (1862), 4 Allen (Mass.), 138; 81 Amer. Dec. 694; *Regina v. Stephens* (1865), L. R., 1 Q. B. 702; *Rex v. Medley* (1834), 6 Car. & P. 292.

²⁹ *Chicago, etc., R. v. Watkins* (1890), 43 Kans. 50; 22 Pac. 985; 40 Am. & Eng. R. Cas. 499. Where land had been appropriated by the contractor for the purposes of the work of constructing a railway, it was held that the person thus damaged could recover directly from the company. *Vermont, etc., R. v. Baxter* (1850), 22 Vt. 365. Cf., *LESHER v. WABASH, etc., R.* (1852), 14 Ills. 85; 56 Am. Dec. 494, materials for dam taken from adjoining land under corporate authority and the company held answerable. To the same effect, *Hinde v. Wabash, etc., Co.* (1853), 15 Ills. 72. And it is no defense that the defendant company had nothing to do with employing the hands doing the work but that they were employed and paid by

the contractors. *Cairo, etc., R. v. Woolsey* (1877), 85 Ills. 370. A railroad company by whose direction a contractor for the construction of its road enters and builds the road upon the land which it has acquired without having condemned an existing leasehold interest, or acquired that interest in any other manner, is liable as a joint tortfeasor with the contractor and his servants, for damages done by them in the prosecution of the work, to the lessee's crops; *Ullman v. Hannibal, etc., R.* (1877), 67 Mo. 118, distinguished from *Clark v. Hannibal, etc., R.* (1865), 36 Mo. 202. For other cases as to a railroad company's non-liability for a contractor's collateral trespass, see note to 65 L. R. A. 655. It is said that it may be stated as a general rule, that as between a railroad company and a contractor for the construction of the road, the railroad company is liable for the acts of the contractor's employees in entering upon and digging up the lands of others in the course of construction. *Cairo, etc., R. v. Woolsey* (1877), 85 Ills. 370.

of mere dummy corporations, organized by the railroad companies themselves for the purpose of escaping liability for wrongs done in the construction of the road. As soon as these dummy corporations have served their purpose they are dissolved, and property owners who are injured by their trespasses are left remediless. The true theory in all these cases is that of the Illinois Supreme Court . . . viz.: Whenever the independent contractor, in order to prosecute his work under his contract, must exercise in whole or in part a franchise granted by the legislature to his employer, the railroad company, the company must answer for his torts, because it is bound to see to the correct execution of the powers conferred on it by the legislature. An enjoinder of this doctrine makes the company liable for all manner of trespasses of the contractor done while prosecuting the work under his contract; because in every such case he is acting in virtue of the franchise conferred by the legislature upon the railroad company, namely, the franchise of building a railroad. Without the possession of that franchise, the railroad company could not be there by its own servants, nor could it be there by an independent contractor. In such a case persons employed by the company to exercise its powers are deemed, in law, to be its servants or agents, and it is answerable for their trespasses."³⁶

Sec. 125. Same, Duty to Traveler as to Excavations.

In an early Massachusetts case following *BUSH v. STEINMAN*³⁷ a railroad company was compelled to pay damages to a traveler who had been injured in the night

³⁶ Thompson on Negligence, Sec. 672, citing *Rockford, etc., R. v. Wells* (1872), 66 Ills. 321; St.

Louis, etc., R. v. Drennan (1887), 26 Ills. App. 263.

³⁷ (1799), I. B. & P. 404. Reported in full, Sec. 48, *ante*.

the railroads or other works, where the relation of such contractors to the railroad company is such that an ordinary proprietor would not be liable in a similar case.³³ Thus it has been held that a railroad company is not liable for the dumping of earth by an independent contractor engaged in constructing an embankment, on the plaintiff's land outside of the company's right of way.³⁴ Where a subcontractor on a railway committed a trespass in procuring timber on land not belonging to the company, the latter was held not liable to the owner of the land.³⁵

The decisions exempting railroad companies from liability for trespasses committed by independent contractors employed by them "seem to involve, in many cases, a denial of justice to property owners through or along whose property railways are constructed. Railway companies in building their roads, employ non-residents of the particular districts as contractors for that purpose. They are here to-day and away tomorrow. In addition to this, they are often insolvent. What is still worse, they are often composed

³³ *St. Louis, etc., R. v. Knott* (1891), 54 Ark. 424; 16 S. W. 9; *Chicago, etc., R. v. Ferguson* (1893), 3 Colo. App. 414; 33 Pac. 684; 13 Am. Neg. Cas. 647, n; *Wallace v. Newcastle, etc., R.* (1891), 11 Penn. Co. Ct. 347.

³⁴ *Hughes v. Railroad Co.* (1883), 39 Ohio St. 461; 15 Am. & Eng. R. Cas. 100. Where the contractor in the course of construction of the road, unlawfully and willfully seizes upon and appropriated uncondemned land, the railroad company is not liable therefor unless it be shown that it subsequently ratified such action. *Waltemeyer v. Wisconsin, etc., R.* (1887), 71 Iowa, 626; 33

N. W. 140; 30 Am. & Eng. R. Cas. 384. It has been held in Canada that a railroad company is not liable for an injury to adjacent property caused by the wrongful act of an independent contractor in taking earth to construct the embankments from a place and in a manner not authorized by the contract. *Kerr v. Atlantic, etc., R.* (1895), 25 Can. (S. C.), 197.

³⁵ *Parker v. Waycross, etc., R.* (1888), 81 Ga. 387; 8 S. E. 871. Cf., *Waltemeyer v. Wisconsin, etc., R.* (1887), 71 Iowa, 626; 33 N. W. 140; 30 Am. & Eng. R. Cas. 384, hauling earth away beyond right of way.

for the wrongful acts or omissions of persons operating its road by the fact of having transferred its corporate powers to other parties, as by leasing its road and franchises to them, except by special statutory authority; the theory being that to permit such a devolution of public duties and responsibilities would be contrary to public policy.⁴⁰ In the United States the rule prevails that a railroad corporation can not escape the performance of any duty or obligation imposed by its charter or the general law of the state by a voluntary surrender of its road into the hands of lessees, and the operation of the road does not change the relations of the original company to the public.⁴¹ The lessor, by

⁴⁰ *BALSLEY v. ST. LOUIS, ETC., R.* (1886), 119 Ills. 68; 8 N. E. 859; 59 Amer. Rep. 784; 5 Thomps. Corp., Secs. 5584-5, 6293.

⁴¹ *Washington, etc., R. Co. v. Brown* (1873), 17 Wall. (U. S.), 445; *Driscoll v. Norwich, etc., R.* (1894), 65 Conn. 230; 32 Atl. 354; *VIRGINIA, ETC., R. v. WASHINGTON* (1890), 86 Va. 629; 10 S. E. 927; 7 L. R. A. 344; 43 Amer. & Eng. R. Cas. 688; *WHITNEY v. ATLANTIC, ETC., R.* (1857), 44 Me. 362; 69 Amer. Dec. 103; *Stearns v. Atlantic, etc., R.* (1858), 46 Me. 116; *NUGENT v. BOSTON, ETC., R.* (1888), 80 Me. 62; 12 Atl. 797; 6 Amer. St. Rep. 151; *NELSON v. VERMONT, ETC., R.* (1854), 26 Vt. 717; 62 Amer. Dec. 614; *Clement v. Canfield* (1856), 28 Vt. 302; *ABBOTT v. JOHNSTOWN, ETC., R.* (1880), 80 N. Y. 27; 36 Amer. Rep. 572; *Galveston, etc., R. v. Garteiser* (1895), 9 Tex. Civ. App. 456; *Central, etc., R. v. Morris* (1887), 68 Tex. 59; 3 S. W. 457; *International, etc., R. v.*

Kuehn (1888), 70 Tex. 582; 8 S. W. 484; *International, etc., R. v. Eckford* (1888), 71 Tex. 274; 8 S. W. 679; *East Line, etc., R. v. Lee* (1888), 71 Tex. 538; 9 S. W. 604; *Trinity, etc., R. v. Lane* (1891), 79 Tex. 643; 15 S. W. 477; 16 S. W. 18; *Buckner v. Richmond, etc., R.* (1895), 72 Miss. 873; 18 So. 449; *McCoy v. Kansas City, etc., R.* (1889), 36 Mo. App. 445; *National Bank v. Atlanta, etc., R.* (1886), 25 S. C. 220. In Illinois, the precise rule is uncertain. Compare, *OHIO, ETC., R. v. DUNBAR* (1850), 20 Ills. 623; 71 Amer. Dec. 291; *Chicago, etc., R. v. Hart* (1902), 104 Ills. App. 57; *Chicago, etc., R. v. Whipple* (1859), 22 Ills. 105; *Peoria, etc., R. v. Lane* (1876), 83 Ills. 448; *WABASH, ETC., R. v. SHACKLETT* (1883), 105 Ills. 364; 44 Amer. Rep. 791; *Chicago, etc., R. v. Meech* (1895), 163 Ills. 305; 45 N. E. 220; *Chicago, etc., Co. v. Stanford* (1902), 104 Ills. App. 99; *Pennsylvania*

time by reason of the fact that the servants of a contractor with the corporation, had removed and neglected to replace certain barriers which had been placed to protect travelers at a point where a deep cut had been made across the highway in excavating for the company's roadbed.³⁸ Where a railroad company by law is charged with a duty to the public, it cannot excuse itself from a performance of such duty by an independent contract with other parties; and where it is made by law the duty of a railroad company to keep a highway in reasonably safe condition for travel at the point where the highway intersects such railroad right of way or where the law makes it the duty of a railroad company, in making alterations by means of which the highway may be obstructed, to provide and keep in good order suitable temporary ways to enable travelers to avoid or pass such obstructions, and where a party is injured in consequence of the failure of the railroad company to discharge that duty, such company can not escape liability by showing that the work was done by other parties under an independent contract.³⁹

Sec. 126. Same, Lessee, Operating Road.

It is on the same principle that the courts generally hold that a railroad company can not absolve itself from liability

³⁸ *LOWELL v. BOSTON, ETC.*, R. (1839), 23 Pick. (Mass.), 24; 34 Amer. Dec. 33, per Shaw, C. J. In a later Massachusetts case a railroad company breaking up the street for its own benefit and profit was said to stand under a primary obligation not to do it so as to constitute a nuisance dangerous to the public, and it was, therefore, no defense to an action brought by a traveler who had

been injured by it, that the work was delegated to an independent contractor. *WOODMAN v. METROPOLITAN R. Co.* (1839), 149 Mass. 335; 21 N. E. 482; 4 L. R. A. 213; 6 Rail. & Corp. Law J. 72; 14 Amer. St. Rep. 427; 12 Am. Neg. Cas. 80.

³⁹ *CHOCTAW, ETC., R. v. WILKER* (1906), 16 Okla. 384; 84 Pac. 1086; 3 L. R. A. (N. S.), 595; 46 Am. & Eng. R. Cas. 759.

licensee running trains over the licensor's track is imputed on the same ground and under the same circumstances as in the case of a lease.⁴⁶ Where a manufacturing company leased from a railroad company the use of a sidetrack and switch, it thereby assumed the duty toward the railroad company of so managing the sidetrack and switch as not to bring its cars into collision with those of the railroad company, and it can not shift the performance of that duty so as to exonerate itself upon third persons whom it employs to unload its cars.⁴⁷

⁴⁶ Illinois, etc., R. v. Barron (1866), 5 Wall. (U. S.), 90. See, also, Langley v. Railroad Co. (1857), 10 Gray (Mass.), 103; York, etc., R. v. Winans (1854), 17 How. (U. S.), 30; Oregon R. v. Oregonian R. Co. (1888), 130 U. S. 23; 9 Sup. Ct. 409; Central Transportation Co. v. Pullman Palace Car Co. (1891), 139 U. S. 62; 11 Sup. Ct. 478; Quested v. Newburyport, etc., R. (1879), 127 Mass. 204. *Contra*, Miller v. Railroad Co. (1890), 125 N. Y. 118; 26 N. E. 35. "Where a railroad is leased, both the lessor and lessee are jointly and severally liable for the negligence of the latter in operating the road. Central, etc., R. v. Wood (1901), 129 Ala. 483; 29 So. 776; PENNSYLVANIA CO. v. SLOAN (1888), 125 Ills. 72; 17 N. E. 37; 8 Am. St. Rep. 337; Chicago, etc., R. v. Schmitz (1904), 211 Ills. 446; 71 N. E. 1050; Logan v. North Carolina R. Co. (1895), 116 N. C. 940; 21 S. E. 959; Tillett v. Norfolk, etc., R. Co. (1896), 118 N. C. 1031; 24 S. E. 111; Kinney v. North Carolina, etc., R. (1898), 122 N. C. 961; 30 S. E. 313;

HARDEN v. NORTH CAROLINA R. Co. (1901), 129 N. C. 354; 40 S. E. 184; 85 Am. St. Rep. 747; 55 L. R. A. 784; HARMON v. COLUMBIA, ETC., R. (1888), 28 S. C. 401; 5 S. E. 835, with note; 13 Am. St. Rep. 686; PARR v. SPARTENBURGH, ETC., R. (1895), 43 S. C. 197; 20 S. E. 1009; 49 Am. St. Rep. 826; Cogswell v. West St., etc., R. (1892), 5 Wash. 46; 31 Pac. 411; FISHER v. WEST VIRGINIA, ETC., R. (1894), 39 W. Va. 366; 19 S. E. 578; 23 L. R. A. 758. But where the lease is sanctioned by legislative authority and the lessee is given exclusive possession and control of the road, the lessee is alone liable. Pinkerton v. Pennsylvania, etc., Co. (1899), 193 Penn. St. 229; 44 Atl. 284. In St. Louis, etc., R. v. Trigg (1897), 63 Ark. 536; 40 S. W. 579, a railroad and its receivers were held jointly liable for a nuisance caused by an embankment so negligently constructed as to flood the plaintiff's land." Cooley on Torts, Student's Ed., p. 97, *et seq.*

⁴⁷ Montgomery, etc., Co. v. Montgomery, etc., R. (1888), 86

accepting its charter assumes the obligation to carry passengers and freight safely over its line. Should the lessee fail to do this, the lessor is liable.⁴²

Regarding the effect of statutes authorizing the sale or lease of a railroad company's equipment there is conflict among the decisions. For a discussion of these cases, see the note by a learned author to a recent case, cited below.⁴³ Certain statutory undertakings (such as an electric light company, a municipal ferry, etc.), have been held to come within the rule holding railroad companies for the acts of lessees engaged in operating the same.⁴⁴

The liability of a railway company for the torts of another company operating its lines under a lease executed without any statutory authority has apparently not been considered in England. But that such liability still attaches is in full accord with the rules established there that a covenant to make such a lease is void, and that an unauthorized agreement amounting to a delegation of statutory authority is likewise invalid.⁴⁵ Liability for the negligence of a

Co. v. Ellett (1890), 132 Ills. 654; 24 N. E. 559; Pittsburg, etc., R. C. v. Campbell (1877), 86 Ills. 443, in this and in the following case, the duty violated was statutory; BALSLEY v. ST. LOUIS, ETC., R. (1886), 119 Ills. 68; 8 N. E. 859; 59 Amer. Rep. 784.

⁴²EAST LINE, ETC., R. v. CULBERSON (1888), 72 Tex. 375; 10 S. W. 706; 3 L. R. A. 567; 13 Amer. St. Rep. 805; Trinity, etc., R. v. Lane (1891), 79 Tex. 643; 15 S. W. 477; 16 S. W. 18; BALTIMORE, ETC., R. v. PAUL (1895), 143 Ind. 23; 40 N. E. 519; 28 L. R. A. 216.

⁴³Note by Mr. C. B. Labatt to ANDERSON v. FLEMING (1903,

Ind.), in 66 L. R. A., at p. 144, *et seq.*

⁴⁴Capital Electric Co. v. Hauswald (1898), 78 Ills. App. 359; Duncan v. Magistrates, etc. (1877), Ct. of Sess., 14 Scot. L. R. 603; but see, Blackwell v. Wiswall (1855), 24 Barb. (N. Y.), 355.

⁴⁵On the first rule see EAST ANGLIAN RAILROAD v. EASTERN COUNTIES RAILROAD (1851), 11 C. B. 775; 7 Eng. R. & Corp. Cas. 150. On the second, see Beman v. Rufford (1851), 1 Sims (N. S.), 550; GREAT NORTHERN RAILROAD v. EASTERN COUNTIES RAILROAD (1851), 9 Hare, 306; 7 Eng. R. & Corp. Cas. 643.

company exercises its own franchises and not those of the licensor, and the latter is not liable to its employes for injuries caused by the negligent use of a common track by the employees of the licensee company.⁵⁰

Sec. 129. Liability as Warehousemen.

A railroad company, as a warehouseman, is not liable for the destruction of goods by fire communicated from a pile-driving engine which was being operated by an independent contractor engaged in repairing the company's wharf.⁵¹

Sec. 130. Street Railroads.

A street railway company is liable for personal injuries caused by negligence in the manner of guarding excavations in a street which are necessary to the construction of its tracks, although the work is done by an independent contractor, but under a permit from the city to the company.⁵² Thus an electric railroad company which has let to independent contractors the digging of a certain number of post-holes in a public street, by a contract fixing the size of the holes and nothing more, is liable for an injury caused by falling into one of the holes which is completed two or three days before the accident.⁵³

Sec. 131. Carrier's Duty, Generally.

Whatever the rule may be in other relations, when the question involves the duty of a common carrier toward his

⁵⁰ *GEORGIA, ETC., R. V. FRIDDELL* (1887), 79 Ga. 489; 7 S. E. 214; 11 Amer. St. Rep. 444.

⁵¹ *BRUNSWICK, ETC., CO. V. BRUNSWICK, ETC., R.* (1898), 106 Ga. 270; 39 S. E. 92; 71 Amer. St. Rep. 249.

⁵² *WOODMAN V. METROPOLITAN*

R. Co. (1889), 149 Mass. 335; 21 N. E. 482; 4 L. R. A. 213; 6 Rail. & Corp. Law J. 72; 14 Amer. St. Rep. 427; 12 Am. Neg. Cas. 80.

⁵³ *Donovan v. Oakland, etc., R. T. Co.* (1894), 102 Cal. 245; 36 Pac. 516.

In one case the doctrine is stated without qualification that the lessor of a railroad is not liable to an employee of the lessee for injuries resulting from the use of defective machinery, the same being a part of the leased property.⁴⁸

Sec. 127. Same, Trustee Operating Road.

If a railroad company devolves the execution of its franchise upon trustees for mortgage bondholders, where such trustees are not acting under the order of any court but are operating the road in the name of the company, it remains liable for the acts of such trustees.⁴⁹

Sec. 128. Railroads Using Tracks in Common.

Where there is a mutual arrangement for the joint use of terminal tracks between the company owning them and another company also having a chartered right to enter the same city, they are entitled to make use of common tracks at the terminal point and in doing this the licensee

Ala. 372; 5 So. 735. It is settled that, unless such a transfer has been expressly authorized by statute, a railway company does not divest itself of its liability to third persons by selling, or leasing, its franchise. *Ricketts v. Birmingham St. R. Co.* (1888), 85 Ala. 600; 5 So. 353, in which case the plaintiff was thrown to the ground by the sudden starting of a street car.

⁴⁸ *Buckner v. Richmond, etc., R.* (1895), 72 Miss. 873; 18 So. 449, citing *VIRGINIA, ETC., R. v. WASHINGTON* (1890), 86 Va. 629; 10 S. E. 927; 43 Amer. & Eng. R. Cas. 688; 7 L. R. A. 344; *EAST LINE, ETC., v. CULBERSON* (1888), 72

Tex. 375; 10 S. W. 706; 13 Amer. St. Rep. 805; 3 L. R. A. 567. "This decision does not seem to conform to the current of judicial authority," declares Judge Thompson. "It proceeds upon the ground that, without reference to the question whether the lease was authorized or not, the servant of the lessee must look to his own master only, for redress of the injuries sustained by him in the service. 'To his own master he standeth or falleth.'" *Thomps. Neg.*, Sec. 669, note 108.

⁴⁹ *WISCONSIN, ETC., R. v. ROSS* (1892), 142 Ills. 8; 31 N. E. 412; 12 Railroad & Corp. Law J. 81; 34 Amer. St. Rep. 49.

Sec. 132. Same, Safe Premises.

The duty of a common carrier to provide safe stations, waiting rooms, platforms, approaches, passage-ways, etc., for the use and convenience of its passengers, as well as a safe roadway and safe vehicles, is so absolute in its nature that the carrier can not shift the responsibility for failing to perform it upon the shoulders of an independent contractor.⁵⁶ In other words the duty of the carrier towards a passenger to supply safe and convenient stations and approaches, is a primary duty and it cannot be transferred to an independent contractor employed to construct or repair the premises of the carrier, so as to exonerate the latter from responsibility for the condition of his premises.⁵⁷

quired to issue a bill of lading for cotton in exchange for compress company receipts, such bill of lading providing that each carrier carrying the cotton shall be entitled, at its own cost, to compress it for greater convenience in handling and forwarding, the compress company which provides its own platform, machinery and employees, and determines for itself the manner and time for preparing the cotton for shipment, is an independent contractor for whose negligence the railroad company is not liable. *Arthur v. Texas, etc.*, R. (1905), 139 Fed. 127, reversed on other grounds (1907), 204 U. S. 505; 40 Am. & Eng. R. Cas. (N. S.), 17.

⁵⁶ *Barrows, etc., Co. v. Kane* (1898), 88 Fed. 197; 59 U. S. App. 574; *Thomps. Neg.*, Secs. 669, 2804, 3391.

⁵⁷ *Gilmore v. Philadelphia, etc.*,

R. (1893), 154 Penn. St. 375; 25 Atl. 774; *DELAWARE, etc., R. v. TRAUTWEIN* (1890), 52 N. J. L. 169; 7 L. R. A. 435; 7 Rail. & Corp. Law J. 316; 41 Atl. 178; 19 Amer. St. Rep. 442; *Watson v. Oxanna Land Co.* (1891), 92 Ala. 320; 8 So. 770. A carrier was held liable where a passenger was injured by falling through an opening at the head of a flight of stairs used as a means of access to the station, although the opening had been left by an independent contractor in repairing the stairway. *Gilmore v. Philadelphia, etc., R.*, *supra*. Where a passenger was injured in consequence of the defective condition of a bridge on the grounds of the railroad company, forming part of its recognized way to and from its trains, the company was held liable, notwithstanding it had an

passengers, the person constructing his machinery or appliances becomes his *alter ego* and the doctrine of *respondet superior* applies. The question is not one of personal negligence of the carrier but it is equally a question of the negligence of the agents who constructed the machine. Thus, where the accident resulted from the washing away of the embankment of a railroad, caused by insufficient drainage, it was held that the company would not be relieved of liability, by showing the fact that the road was constructed under the supervision of a competent engineer and that the drainage at the point of the accident was provided for in a manner directed and approved by him.⁵⁴ The exact rule of skill and diligence, which the law imposes on the carrier to the end that his means of transportation shall be safe, would be substantially frittered away if the courts were to hold that when those means of transportation fail, to the injury of his passengers, the carrier can shelter himself behind the negligence of the manufacturer or contractor by whom they were originally made. The rule which exonerates a proprietor from the payment of damages, happening through the negligence of an independent contractor doing work on his premises, has no application to the case where the contractor is constructing or repairing the roadway or the vehicles of transportation of a carrier of passengers.⁵⁵

⁵⁴ PHILADELPHIA, ETC., R. V. ANDERSON (1880), 94 Penn. St. 351; 39 Amer. Rep. 787. See Sec. 134, *post*.

⁵⁵ CARRICO V. WEST VIRGINIA, ETC., R. Co. (1891), 35 W. Va. 389; 14 S. E. 12; (1894), 39 W. Va. 86; 19 S. E. 571; 24 L. R. A. 50. See Sec. 133. "It is well settled that a railway company cannot, by any form of agree-

ment, whether it be made with another company or with an individual, relieve itself from responsibility for the non-performance of the duties which are incident to the discharge of its functions as a common carrier." Note to ANDERSON V. FLEMING (1903, Ind.), 66 L. R. A. 140, citing cases, *q. v.* Where, under state regulation, a railroad is re-

answerable for an accident due to an imperfection in the vehicle used, if discoverable by a reasonable examination, although such proprietor employed a competent coach maker.⁶⁰ In one case it was held that the recovery was properly denied where the carrier showed not only that it purchased the appliances responsible for the accident from a reputable dealer, but also that it had subjected the appliances to a daily inspection by an expert employee, and the plaintiff offered no rebuttal, relying wholly on the doctrine of *res ipsa loquitur*.⁶¹

Sec. 134. Same, Safe Tracks, etc.

In an action against a railroad company by a passenger for injuries resulting from an obstruction of the track by

Western (1861), 34 Barb. (N. Y.), 256. There is authority that a carrier is responsible for defects in its cars though such defects could not have been discovered after the cars came into its possession if they could have been discovered by the exercise of the proper care and skill in their construction. *Siemens v. Oakland*, etc., R. (1901), 134 Cal. 494; 66 Pac. 672.

⁶⁰ *Sharp v. Gray* (1833), 9 Bing. 457; 2 Moore & S. 621. To the same effect concerning railway engine and cars, *HEGEMAN v. WESTERN R. CORP.* (1853), 16 Barb. (N. Y.), 353; (1855) 13 N. Y. 9; 64 Amer. Dec. 517; *McPADDEN v. NEW YORK, ETC., R.* (1871), 44 N. Y. 478; 4 Amer. Rep. 705; *MEIER v. PENNSYLVANIA R. Co.* (1870), 64 Penn. 228; 3 Amer. Rep. 581; *TOLEDO, ETC., R. v. BEGGS* (1877), 85 Ills. 80; 28 Amer. Rep. 613. Also as to bridges: *GROTE v. CHESTER, ETC.,*

R., supra. And to defects in tracks due to negligence of one contracting to construct or maintain same: *Virginia, etc., R. v. Sanger* (1859), 15 Gratt. 230; 10 Am. Neg. Cas. 366; *CARRICO v. WEST VIRGINIA, ETC., R.* (1891), 35 W. Va. 389; 14 S. E. 12; (1894), 39 W. Va. 86; 19 S. E. 571; 24 L. R. A. 50. A stage company was held liable for the death of a passenger caused by an accident to its stage while on a ferry boat owned by another, but constituting a part of its route, for which ferriage was paid by it, the accident occurring by the negligence of the ferryman without defendant's participation, the court considering that, as to passengers, the ferry company was, in law, the employee and servant of defendant. *McLean v. Burbank* (1866), 11 Minn. 277.

⁶¹ *Murray v. Pawtucket, etc., R.* (1903), 25 R. I. 209; 55 Atl. 491.

Sec. 133. Same, Safe Vehicles, etc.

The carrier's obligation to transport the passengers safely cannot be shifted from himself by delegation to an independent contractor; and it extends to all agencies employed, and includes the duty of protecting the passengers from any injury caused by the act of any subordinate or third person, engaged in any part of the service required by the contract of transportation. The case cited below ⁵⁸ was quite analogous to those in which it has been held that a railroad company is responsible for the neglect or misconduct of the servants of a sleeping car company whereby a passenger sustains loss or injury while being transported under a contract with the railroad company. By the weight of authority the negligence of the manufacturer of the vehicles used by a common carrier is in theory of law, the negligence of the carrier himself, and it is not sufficient that the carrier assures himself that the manufacturer is of good repute in his business.⁵⁹ A coach proprietor is

agreement with a third person whereby the latter was bound to keep the bridge in repair. *Watson v. Oxanna, etc., Co.*, *supra*. But it has been said that the lessee of a dock is not liable for injuries caused by the fall of a chute which had been negligently set up by a stevedore's subcontractor. *Woodward v. Peto* (1862), 3 Fost. & F. 389.

⁵⁸ *Barrow Steamship Co. v. Kane* (1898), 88 Fed. 197; 59 U. S. App. 574, citing *Pennsylvania Co. v. Roy* (1880), 102 U. S. 451; *DWINNELL v. NEW YORK, ETC., R.* (1890), 120 N. Y. 117; 24 N. E. 319; 8 L. R. A. 224; 17 Amer. St. Rep. 611; *KINSLEY v. LAKE SHORE, ETC., R.* (1874), 125 Mass.

54; 28 Amer. Rep. 200; *RAILROAD Co. v. WALRATH* (1882), 38 Ohio St. 461; 43 Amer. Rep. 433.

⁵⁹ *HEGEMAN v. WESTERN RAILROAD* (1853), 16 Barb. (N. Y.), 353; (1855), 13 N. Y. 9; 64 Am. Dec. 517; *Caldwell v. New Jersey, etc.* (1872), 47 N. Y. 282; *CARROLL v. STATEN ISLAND R. R.* (1874), 58 N. Y. 126; 17 Amer. Rep. 221; *Burns v. Cork, etc., R.* (1863), 13 C. L. (N. S.), 543. *Contra* and unsound, *GRAND RAPIDS, ETC., R. v. HUNTLEY* (1878), 38 Mich. 537; 31 Amer. St. Rep. 321. The same rule applies as to competent engineers. *GROTE v. CHESTER, ETC., R.* (1848), 2 Exch. 251; 5 Eng. R. & C. Cas. 649; *Brehm v. Great*

Sec. 135. Same, Sleepers, etc.

In the earliest case on this subject, it was declared that if one "who has made a contract with a railroad company for his personal transportation from one place to another, takes a seat in a sleeping car and there loses an article of personal baggage through the negligence of a person in charge of the car and without fault on his own part, it is no defense to an action against the corporation that the car was not owned by the defendant, but by a third person, who by a contract with the defendant, provided conductors and servants, in the absence of the evidence that the plaintiff had knowledge of these facts."⁶⁵ In a New York case, the court held, in effect, that those in charge of drawing-room and sleeping cars owned by parties other than the railway company operating the rest of the train are to be regarded and treated, in respect to any matter involving the safety and security of the passengers, as the servants of the railroad company and for their acts it is responsible to the same extent as if they were directly employed by it.⁶⁶

WABASH, ETC., R. v. PEYTON (1883), 106 Ills. 534; 46 Amer. Rep. 705. A municipality was not liable, in Scotland, where the lessee of its ferry neglected to see to it that the wire rope by which the ferry was operated was kept in a safe condition. Duncan v. Magistrates, etc. (1877, Ct. of Sess.), 14 Scot. L. R. 603.

⁶⁵ KINSLEY v. LAKE SHORE, ETC., R. (1878), 125 Mass. 54; 28 Amer. Rep. 200; Louisville, etc., R. v. Katzenberger (1886), 16 Lea (Tenn.), 380; 57 Amer. Rep. 232.

⁶⁶ THORPE v. NEW YORK, ETC., R. (1879), 76 N. Y. 406; 32 Amer. Rep. 325. To the same

effect: Pennsylvania Co. v. Roy (1880), 102 U. S. 451; 26 Law Ed. 141; JONES v. ST. LOUIS, ETC., R. (1894), 125 Mo. 675; 28 S. W. 883; 26 L. R. A. 718; 46 Amer. St. Rep. 514; CLEVELAND, ETC., R. v. WALRATH (1882), 38 Ohio St. 461; 43 Amer. Rep. 433; WILLIAMS v. PULLMAN, ETC., Co. (1888), 40 La. Ann. 417; 4 So. 85; 8 Amer. St. Rep. 538; DWINNELLEE v. NEW YORK, ETC., R. (1890), 120 N. Y. 117; 24 N. E. 319; 8 L. R. A. 224; 17 Amer. St. Rep. 611; ULRICH v. NEW YORK, ETC., R. (1888), 108 N. Y. 80; 15 N. E. 60; 2 Amer. St. Rep. 369.

work being done thereon, it is no defense that the defendant had placed the work in the hands of an independent contractor and that the latter's negligence had caused the obstruction.⁶² If a railway company while using its tracks for the carriage of passengers engages in a work to be done in immediate proximity to the track, negligence in the performance of which would, in the opinion of cautious persons, endanger the passage of its cars, and an accident to a passenger is caused by an obstruction arising from negligence in the performance of such work, the company must pay damages; it will be no defense that the work was placed in the hands of a contractor and that the negligence which caused the injury was that of one of his employees, as where, through the negligence of the servants of a contractor for the doing of certain stonework for a railway company, a stone was rolled or shaken from an embankment and rolled under the wheels of a passenger train throwing a car from the track and injuring a passenger.⁶³ A railway company is required to answer for tortious acts committed by the servants of another railway company on whose tracks it has been licensed to operate trains; thus, a company is liable for the negligent management of a switch whereby a passenger receives injury, although it is provided and attended to by a servant of the company owning the track.⁶⁴

⁶² *CARRICO v. RAILROAD Co.* (1891), 35 W. Va. 389; 14 S. E. 12; (1894), 39 W. Va. 86; 19 S. E. 571; 24 L. R. A. 50. See, also, *Donovan v. Transit Co.* (1894), 102 Cal. 245; 36 Pac. 516; *LANCASTER AVENUE IMP. Co. v. RHOADS* (1887), 116 Penn. St. 377; 9 Atl. 852; 2 Amer. St. Rep. 608.

⁶³ *Virginia, etc., R. v. Sanger* (1859), 15 Gratt. (Va.), 230; 10 Am. Neg. Cas. 366; *Burns v.*

Cork, etc., R. (1863), 13 Irish C. L. (N. S.), 543.

⁶⁴ *McELROY v. NASHUA, ETC., R.* (1849), 4 Cush. 400; 50 Amer. Dec. 794. Cf., *MURRAY v. LEHIGH, ETC., R.* (1895), 66 Conn. 512; 34 Atl. 506; 32 L. R. A. 539. And the converse of this is true, and a licensee company which operates its trains over another's road is liable for injuries caused to a passenger by a defective track.

passengers to take passage and be transported on such a train, in which exceptional case he makes the independent contractor his servant or agent in respect of such passenger; but it will always be a question of difficulty, under such circumstances, whether the relation of carrier and passenger has been created. If the person being so transported pays fare to the railway company, there will be no difficulty in holding that the relation has been established; but if, on the other hand, he is permitted to ride by the mere courteous or officious act of the independent contractor then the contrary would seem to be the proper conclusion.⁶⁸

Sec. 138. Same, as to Criminal Acts.

Under an English statute, providing that a carrier should be answerable for injuries "from the felonious acts of any coachman, guard, bookkeeper, porter or other servant in his employ," it was held that "servant" includes one who is directly or indirectly employed by the carrier to do what such carrier has contracted to do. Hence, a carrier under such act is liable for the theft of an article by a firm's employee with which a subcontract had been made to deliver certain goods, including those stolen.⁶⁹

⁶⁸ *Thomps. Neg.*, Secs. 628, 3392. Wherever a statute or the common law imposes a special duty on the employer, such as the duty of a common carrier to transport their passengers or freight safely, such precautions must be taken and the employer cannot escape liability by letting the work to a contractor ever so skillful or careful. *Burd. Torts*, p. 144, citing and quoting *Barrow Steamship Co. v. Kane* (1898), 88 Fed. 197; 59 U. S. App. 574.

⁶⁹ *MACHU v. LONDON, ETC., R.* (1848), 2 Exch. 415; 5 Eng. Ry. Cas. 302. A railroad company was held liable for goods obtained through a forged order while lying in defendant's station, and misappropriated by an employee of the proprietor of the receiving office at which plaintiff had earlier delivered them for transmission to the station. *Stephens v. London, etc., R.* (1886), L. R., 18 Q. B. Div. 121.

Sec. 136. Same, Special Contract as to Freight.

A railway company for extra compensation agreed to keep a certain car in which plaintiff's perishable goods were loaded, at a certain temperature sufficiently cold to preserve the goods to their destination. The company failed to do this and the goods were lost. "It is the contention of the appellant company that it discharged its duty to appellees when it furnished a refrigerator car, and that the duty of icing the car, under the evidence, devolved on the X. company, the owner of the car. The contention is unsound. . . . It matters not . . . that the refrigerator car belonged to the X. company, an independent contractor. Appellees had no contract with it to furnish cars, or to use them when furnished." The railway company was held liable for the negligence of the X. company.⁶⁷

Sec. 137. Same, As to running Trains.

If the carrier commits a locomotive and train of cars to a contractor to be used by the latter in executing his contract, then for an injury which may happen to any one through the negligent management of such train by the contractor or his servants, the contractor and not the carrier will be answerable. To this statement an exception may exist where, by a custom or otherwise, the carrier permits

⁶⁷ ST. LOUIS, ETC., R. CO. v. RENFROE (1907), 82 Ark. 143; 100 S. W. 889; 10 L. R. A. (N. S.), 317. Citing and relying on NEW YORK, ETC., R. v. CROMWELL (1900), 98 Va. 227; 35 S. E. 444; 49 L. R. A. 462; 81 Amer. St. Rep. 722. An English statute provides that every carrier company within its purview shall be liable for the loss of or injury to any cattle, etc., caused by the

neglect or default of such company or its "servants" notwithstanding any contrary notice, etc., given by the company. Under this act, a railway company was held answerable for the negligence of a master and crew of a steamer with whose owners the company had contracted for the conveyance of certain cattle. Doolan v. Midland R. (1877), L. R., 2 App. C. C. 792.

that a city will be liable for the negligence of a contractor in its employ where the work is performed under the direct control of the city's own officers.⁷² If otherwise liable, a city will continue liable although it has no control over the workmen of a contractor and although it has, in its agreement with the contractor, stipulated that he shall be liable for accidents occasioned by his neglect.⁷³ If the work be done by an independent contractor, the city will not be answerable where the injury is through some negligence of the contractor or his servant, not amounting to a failure of a duty which the city itself owes to the person injured; otherwise it would be liable for his neglects in like manner as where the work is executed by its own officers.⁷⁴ In England the liability of a municipality, or other public body having charge of highways, for injuries due to unsafe conditions caused by the negligence of an independent con-

⁷² *Smith v. Seattle* (1899), 20 Wash. 613; 58 Pac. 389; *Penny v. Wimbledon, etc., Council* (1898), 2 Q. B. Div. 212; 7 Am. Neg. R. 158, n. That the contract between the city and the contractor in a given case was not executed in due form will not relieve the city from liability. *Hepburn v. Philadelphia* (1892), 149 Penn. St. 335; 24 Atl. 279; 33 Amer. St. 482; 15 L. R. A. 821.

⁷³ *Wilson v. Wheeling* (1882), 19 W. Va. 323; 42 Amer. Rep. 780. From the responsibility to which a municipality is ordinarily subjected it cannot relieve itself by inserting in the contract a provision requiring the contractor to see that third persons are adequately protected while the work is in progress. *Brooks v. Somer-*

ville (1871), 106 Mass. 271; *Russell v. Columbia* (1881), 74 Mo. 480; 41 Amer. Rep. 325; *Pettengill v. Yonkers* (1889), 116 N. Y. 558; 22 N. E. 1095; 15 Amer. St. Rep. 442.

⁷⁴ *Fink v. St. Louis, etc., R.* (1872), 71 Mo. 52; *Barry v. St. Louis* (1852), 17 Mo. 121, followed in *Schweickardt v. St. Louis* (1876), 2 Mo. App. 571; disapproved in *Welch v. St. Louis* (1880), 73 Mo. 71; *Haniford v. Kansas City* (1890), 103 Mo. 172; 15 S. W. 753; *Baltimore v. O'Donnell* (1879), 53 Md. 110; 36 Amer. Rep. 395. For city's liability under statute, see *Seattle v. Buzby* (1880), 2 Wash. Terr. 25; 3 Pac. 180; *St. Paul v. Seitz* (1859), 3 Minn. 297; 74 Amer. Dec. 753.

Sec. 139. Cities and Towns, Generally.

"It is not easy to determine when a municipality is liable for the negligence of a contractor. It certainly can not relieve itself from the duty which rests upon it by transferring that duty to a contractor. The corporation must see that the public is properly protected, and if the contractor fails to perform that duty the city is responsible for the resulting damages."⁷⁰ The city will be responsible for the acts of an independent contractor if the matter involved in his contract is one of absolute duty owed by the city to an individual or the work is intrinsically dangerous, or when properly done creates a nuisance.⁷¹ It is the general rule

⁷⁰ Elliott Munic. Corps., p. 270, citing *TURNER v. NEWBURGH* (1888), 109 N. Y. 301; 16 N. E. 344; 4 Amer. St. Rep. 453; *JEFFERSON v. CHAPMAN* (1889), 127 Ills. 438; 20 N. E. 33; 11 Amer. St. Rep. 139; *Circleville v. Neuding* (1885), 41 Ohio St. 465; *HINCK v. MILWAUKEE* (1879), 45 Wisc. 565; 32 Amer. Rep. 735; *Grant v. Stillwater* (1886), 35 Minn. 242; 28 N. W. 660.

⁷¹ *Bennett v. Mount Vernon* (1904), 124 Iowa, 537; 100 N. W. 349; 16 Am. Neg. R. 612, n.; *CHICAGO v. MURDOCK* (1904), 212 Ills. 9; 72 N. E. 46; 103 Amer. St. Rep. 221, blasting for tunnel. "The accepted doctrine in the United States is that a municipality which is charged with the duty of keeping certain highways in safe condition for public travel, and which has either authorized, or has been constrained by the operation of statute to permit, the performance of work which, in the absence of certain precautions, will necessarily render one

of these highways abnormally dangerous for the time being, is liable for injuries caused by the absence of these precautions whatever may be its relation to the party who is actually engaged in doing the work. The municipality lies in this regard under a primary, absolute, or non-delegable duty, in the performance of which it is bound to use reasonable care and diligence." ["See, generally, *TURNER v. NEWBURGH*, *supra*; *Brusso v. Buffalo* (1882), 90 N. Y. 679; and the cases cited in the following notes."] Note to *ANDERSON v. FLEMING* (1903, Ind.), 66 L. R. A. 126. "As the city is the principal in the duty imposed, it must occupy the same position when damages are claimed for a neglect of that duty.

A corporation, like individuals, is required to exercise its rights and powers and with such precautions as shall not subject others to injury." *Springfield v. LeClaire* (1869), 49 Ills. 476.

has actual or implied notice.⁷⁷ The duty of the city to erect barriers and to establish signals in case of dangerous defects, etc., in the highway is not discharged by engaging a contractor to perform it. A city is liable for negligent injuries to a person traveling over a sidewalk in the course of construction, where the permit for the work stated that it should be done "under the superintendence of the city engineer."⁷⁸ But where the negligence relates to a matter with reference to which the corporation is under no special obligation, the liability rests on the contractor alone.⁷⁹

⁷⁷ *Vincennes v. Spees* (1905), 35 Ind. App. 389; 74 N. E. 277, reversing 72 N. E. 531. Cf., *McEvoy v. Sault Ste. Marie* (1904), 136 Mich. 172; 98 N. W. 1006.

⁷⁸ *McClammy v. Spokane* (1904), 36 Wash. 339; 78 Pac. 912. An Ontario statute authorized a city to enter into an agreement for the construction of a street railway, and to pass by-laws for the purpose of carrying any such agreement into effect; under it, a city council passed a by-law providing that the strip between the rails and adjacent thereto should be kept in repair by the company constructing the railway, that the company should remove all ice and snow from the tracks under the direction of the city commissioner, that the company should be liable for all damages occasioned to any person by reason of the construction, repair or operation of the railway or by reason of any default in repairing those parts of the streets which the company was required to keep in repair; and that the

city should be indemnified by the company from all liability in respect to such damages. During one winter the company had removed the ice and snow from its tracks and laid these in the center of the street, resulting in forming a deep depression at the tracks. Plaintiff's sleigh was thereby overturned and he was injured. The court held that notwithstanding the legislation, agreement and by-law above referred to, the defendant city was liable to the plaintiff. *Carty v. London* (1889), 18 Ont. R. 122. In a dictum, probably correct, the court said the defendant had a right of reimbursement against the railway company.

⁷⁹ *Elliott Pub. Corps.*, p. 270, citing *Harvey v. Hillsdale* (1891), 86 Mich. 330; 49 N. W. 141; *Van Winter v. Henry Co.* (1883), 61 Iowa, 684; 17 N. W. 94. See, also, *HARRINGTON v. LANSINGBURGH* (1888), 110 N. Y. 145; 17 N. E. 728; 6 Amer. St. Rep. 348; *DEPOT v. SIMMONS* (1886), 112 Penn. St. 384; 5 Atl. 434; 56 Amer. Rep. 317.

tractor, has never, it seems, been discussed with specific reference to the conception of an absolute duty or obligation; and the cases, as they stand, appear to be rather unfavorable to the inference that an action is maintainable on this basis.⁷⁵

Sec. 140. Same, Jointly with Contractor.

Whether the city will be jointly liable with a contractor must depend on the circumstances of the case; if, for example, an excavation is left unguarded or unlighted by the contractor during the progress of the work, and the city has notice of its dangerous condition, express or implied, then the city will be liable to a traveler who, without fault on his part, is injured by driving or falling into it, because it would be liable if the excavation were made by a stranger.⁷⁶ It may be said generally that it is as much the duty of a municipality to remove or guard against an obstruction to a public highway placed there by a third person, as if it was so placed by the city itself; provided the city

⁷⁵ Taylor v. Greenhalgh (1876), 24 Weck. Rep. 311, reversing L. R., 9 Q. B. 487.

⁷⁶ McAllister v. Albany (1890), 18 Ore. 426; 23 Pac. 845; Scanlan v. Watertown (1897), 14 App. Div. (N. Y.), 1; 43 N. Y. Supp. 618; 1 Am. Neg. R. 487; Beattie v. Detroit (1901), 129 Mich. 20; 88 N. W. 71; Burger v. Philadelphia (1900), 196 Penn. St. 41; 46 Atl. 262. "The distinction seems to be that if the work which the contractor engages to do is in itself unlawful, or so inherently dangerous as to constitute a public nuisance and

to be for that reason unlawful, then both the city and the contractor are liable as joint tortfeasors, just as a master and his servant may be liable for a trespass or other positive wrong ordered by the master and done by the servant to the injury of a third person; whereas, if the work itself is not unlawful or inherently dangerous, but if the danger to the public springs from the unlawful or negligent manner in which the contractor executes the work, he and not the city will be liable therefor." 5 Thomps. Neg., 289.

the damages the city has been compelled to pay for his assumed neglect, it is competent for the defendant to show that he was under no obligation to keep the street in safe condition and that it was not through his fault that the accident happened.”⁸¹

Sec. 141. Same, Safety of Streets.

If the act or omission of the independent contractor is a violation of some primary or inalienable duty of the city, such as that of keeping its streets in a reasonably safe condition for public travel, the city will be liable therefor.⁸² The duty of a city to exercise reasonable care to the end that its highways, streets, sidewalks, etc., shall be reasonably safe for ordinary travel, is absolute in the sense that it is primary and can not be delegated so as to absolve it.⁸³ The duty rests on a municipal corporation to keep

⁸¹ *RICHMOND V. SITTERDING* (1903), 101 Va. 354; 43 S. E. 562; 99 Amer. St. 879; 65 L. R. A. 445; 16 Am. Neg. R. 609, n., citing *BOSTON V. WORTHINGTON* (1858), 10 Gray, 496; 71 Amer. Dec. 678; *CATTERLIN V. FRANKFORT* (1881), 79 Ind. 547; 41 Amer. Rep. 627; the court held the brick contractors to be independent contractors on the authority of *Emmerson v. Fay* (1896), 94 Va. 60; 26 S. E. 386.

⁸² *ANDERSON V. FLEMING* (1903), 160 Ind. 597; 67 N. E. 443; 66 L. R. A. 119; 16 Am. Neg. R. 606, n.; *Glasgow v. Gillenwater* (1902), 23 Ky. Law Rep. 2375; 67 S. W. 381; *contra* and unsound, *HOWARTH V. MCGUGAN* (1893), 23 Ont. R. 396; 47 Amer. & Eng. Corp. Cas. 133.

⁸³ *Beatrice v. Reid* (1894), 41

Nebr. 214; 59 N. W. 770. Cf., *TURNER V. NEWBURGH* (1888), 109 N. Y. 301; 16 N. E. 344; 4 Amer. St. Rep. 453; *Kirk v. Homer* (1894), 77 Hun (N. Y.), 459; 28 N. Y. Supp. 1000; *JEFFERSON V. CHAPMAN* (1889), 127 Ills. 438; 20 N. E. 33; 11 Amer. St. Rep. 139; *Sterling v. Schiffmacher* (1892), 47 Ills. App. 141; *Southwell v. Detroit* (1899), 74 Mich. 438; 42 N. W. 118; *Welsh v. St. Louis* (1880), 73 Mo. 71; *Kollock v. Madison* (1893), 84 Wisc. 458; 54 N. W. 725; *Hill v. Tottenham* (1898), 79 Law T. (N. S.), 495. “It is the duty of a municipal corporation, vested by law with authority over the streets, whilst dangerous works, such as sewers, etc., are being constructed across a street, to have proper precautionary meas-

"The judgment on its merits in the contractor's favor in appellee's action against him conclusively adjudged that he was not liable to appellee, or any person claiming under her, for the same cause of action. If appellee was not entitled to recover for said injury against the contractor, she is not entitled to recover therefor against appellant (city). The contractor had the right, if duly notified by appellant, to appear and set up said former judgment in his favor against appellee, and appellant has the same right; otherwise the contractor would have to defend the same cause twice on its merits." ⁸⁰ One L. was injured by falling over a plank negligently placed over a sidewalk by laborers building houses for one S. He sued the city and later by amendment S. was made a defendant. Judgment was rendered in favor of S. under plea of limitations and against the city for \$1,000, which it paid and then sought to recover from S. Judgment was entered for S. The evidence showed that "S., a general builder and contractor, was erecting for himself four buildings on a lot owned by him, . . . and that he did all the carpenter work by his employees, . . . that J. and G. were general contractors and brick-layers, and as such . . . did all the brick-work on said houses and they were competent, . . . they employed and paid for all labor necessary for the fulfillment of their contract, and exercised entire supervision over same, and over their employees; . . . that a plank . . . was so placed by them or their employees for the use of their laborers in carrying brick, etc., into the buildings." The court held that the judgment in favor of L. was not conclusive in the action pending while conceding that in some cases a city may recover over against a wrongdoing property owner, "in such an action to recover back

⁸⁰ *ANDERSON v. FLEMING* (1903), R. A. 119; 16 Am. Neg. R. 606, n., 160 Ind. 597; 67 N. E. 443; 66 L. citing numerous authorities.

the unsafe condition of its streets even where it exercises no control over the contractor in respect of the manner of doing the work except to see that it is done according to certain specifications.⁸⁵ It is on sound principle that a city is responsible for injuries proceeding from dangerous and unguarded excavations left in its highways by an independent contractor and the very fact of the contract charges the city with notice that the street is being dug up and puts it on inquiry as to whether any excavation made by the contractor is properly guarded and lighted.⁸⁶ Nor can a

tracted with a contractor to take, in excavating a certain public park, the precautions the want of which caused the injury. *STORRS v. UTICA*, *supra*; *BALTIMORE v. O'DONNELL* (1879), 53 Md. 110; 36 Amer. Rep. 395, in which a hack driver sustained an injury by coming in contact with a rope stretched across the street by the superintendent of a contractor of street repairs, acting on his own responsibility, to guard an excavation, of which rope such driver had no warning, it being night, and the lamp which had been suspended to it having been broken and extinguished by boys. *Groves v. Rochester* (1886), 39 Hun (N. Y.), 5. The city's primary duty regarding the safe condition of its streets for travel cannot be delegated to an independent contractor. *Patterson v. Austin* (1895), 15 Tex. Civ. App. 201; 29 S. W. 1139.

⁸⁵ *Circleville v. Neuding* (1885), 41 Ohio St. 465, horse falling into cistern which the city's contractor was digging in one of its streets, by reason of the lack of sufficient

guards around the cistern. Nor does the rule of exemption apply where a public duty is imposed by law upon an officer or public body, and the officer or body charged with the duty commits its performance to another; for instance, a municipal corporation charged by statute with the duty to keep the streets in repair can not escape liability for the negligent performance of this duty on the ground that the immediate negligence was that of a contractor who had been intrusted with its performance. *Tiffany Dom. Rels.*, p. 510, citing *KING v. RAILROAD Co.* (1876), 66 N. Y. 181; 23 Amer. Rep. 37; *STORRS v. CITY OF UTICA* (1858), 17 N. Y. 104; 72 Amer. Dec. 437.

⁸⁶ *DRAKE v. SEATTLE* (1902), 30 Wash. 81; 94 Amer. St. Rep. 844; 70 Pac. 231, city held bound to see that the signals were in place on each recurring night. A city cannot shift the burden of keeping a street safe for public travel upon the contractor employed in grading and paving it, on the ground that he is an in-

its streets in a safe and passable condition and where a contractor with the city failed to place proper guards about an excavation, thereby causing injury to a passerby, the city was held liable.⁸⁴ And the city is nevertheless liable for

ures taken to prevent accidents to passengers during such construction, whether the same is being done by the corporation through its own servants or by contract, or by subcontractors under a primary contractor. Such duty, at least in the cases of independent contractors or subcontractors, is not founded on the principle of *respondeat superior* but is deducible from the authority in the corporation over the streets and the obligation flowing therefrom to protect the public against nuisances or dangerous obstructions in the highways of the city." *Savannah v. Waldner* (1873), 49 Ga. 316, syllabus by court. Cf., *Nashville v. Brown* (1871), 9 Heisk. 1; 24 Amer. Rep. 289. *Contra*, as to purely private corporations, *LANCASTER AVENUE, ETC., CO. v. RHODES* (1887), 116 Penn. St. 377; 9 Atl. 852; 2 Amer. St. 608. An attempt by legislative charter to exempt Milwaukee from liability for work done in streets by contract with its public board, was held invalid as against a general rule of law applicable to all other cities, in *HINCK v. MILWAUKEE* (1879), 46 Wisc. 559; 1 N. W. 230; 32 Amer. Rep. 735. The employer is bound to see that the precautions are taken, in every case where the law, whether statute or common

law, imposes a special duty on the employer, such as the duty of municipal corporations to keep their streets in a reasonably safe condition for those entitled to use them, and it cannot escape liability simply by letting the work to a careful or skillful contractor. *Burd. Torts*, p. 143, citing *Mayor, etc., v. McCary* (1887), 84 Ala. 469; 4 So. 630; *Wiggin v. St. Louis* (1896), 135 Mo. 558; 37 S. W. 528; *OMAHA v. JENSEN* (1892), 35 Nebr. 68; 37 Amer. St. Rep. 432.

⁸⁴ *STORRS v. CITY OF UTICA* (1858), 17 N. Y. 104; 72 Amer. Dec. 437; *City of Ironton v. Kelley* (1882), 38 Ohio St. 50; *WILSON v. CITY OF TROY* (1892), 60 Hun (N. Y.), 183; 14 N. Y. Supp. 721; 135 N. Y. 96; 32 N. E. 44; 31 Amer. St. Rep. 17; 18 L. R. A. 449; *City of Sterling v. Schiffmacher* (1892), 47 Ills. App. 141; *City of Beatrice v. Reid* (1894), 41 Nebr. 214; 59 N. W. 770; *Kollock v. City of Madison* (1893), 84 Wisc. 458; 54 N. W. 725; *Hepburn v. City of Philadelphia* (1892), 149 Penn. St. 335; 24 Atl. 279; *Ray v. City of Poplar Bluff* (1897), 70 Mo. App. 252. The duty of a municipal corporation to keep its streets safe is of such an absolute nature that the city cannot exonerate itself by showing that it had con-

for a specific period, to keep the whole or a part of the highway in repair; *e. g.*, where the work of making repairs was let out by contract, and the injury was caused by a defective bridge;⁸⁹ where a canal company had bound itself to keep a certain bridge in repair and had failed to;⁹⁰ where a county having charge of a certain market house, and charged with the duty to repair it, left an opening (into which plaintiff fell) unguarded and unlighted, in a street adjoining the market place.⁹¹ "If the corporation permits something to exist in its streets and public ways,

⁸⁹ JACKSONVILLE V. DREW (1882), 19 Flor. 106; 45 Amer. Rep. 5.

⁹⁰ EYLER V. ALLEGHANY CO. (1878), 49 Md. 257; 33 Amer. Rep. 249.

⁹¹ Blake v. St. Louis (1867), 40 Mo. 569. "The absolute quality of the duty of a municipality to keep the highways under its control in safe condition may be further illustrated by the decisions in which an action has been held maintainable for injuries caused by the negligence of persons authorized to perform some work which rendered the highway's surface abnormally insecure, and had omitted to protect the public against dangers known to be the natural and necessary consequence of what they had undertaken to do." Note to ANDERSON V. FLEMING (1903, Ind.), 66 L. R. A. 132, citing Badenhap v. Sandhurst (1864, Vict.), 1 W. W. & A. B. 136; King v. Cleveland (1885), 28 Fed. 835, plaintiff drove into materials left on street by contractor erecting house; Magee v. Troy (1888), 48 Hun (N. Y.), 383, 1 N. Y. Supp. 541, same

facts. "This duty (*i. e.*, as to safety of streets, etc.) may be further illustrated by the decisions sustaining actions to recover for injuries caused by abnormal dangers which resulted from building operations carried on by a contractor in an abutting landowner's employ; and for injuries received by travelers, owing to the existence of abnormally dangerous conditions produced in highways by the operations of railway companies acting under legislative authority." Note to ANDERSON V. FLEMING, *supra*, citing *inter alia*, Currier v. Lowell (1834), 16 Pick. (Mass.), 170; Willard v. Newbury (1850), 22 Verm. 458; Batty v. Duxbury (1852), 24 Verm. 155; Phillips v. Veazie (1855), 40 Me. 98; Elliott v. Concord (1853), 27 N. H. 204. The city is entitled to recover over against the negligent railway company. Willard v. Newbury, *supra*. For a municipality's liability concerning work on highways, see cases cited in 65 L. R. A. 650, *et seq.*

municipality claim exemption from liability for defects in a street by reason of its not accepting the work of the contractor, where the defect has existed long enough to charge its officials with knowledge.⁸⁷ A city is chargeable with notice of the existence of a dangerous obstruction in one of its streets where such defect is the result of the negligence of contractors under the city, so as to dispense with the necessity of giving it express notice of its existence.⁸⁸ In a group of cases the municipality has been held responsible for the negligence of a party who had undertaken,

dependent contractor, and that the rule of *respondeat superior* does not apply between him and the city. *Birmingham v. McCreary* (1887), 84 Ala. 469; 4 So. 630; 27 Cent. L. J. 598. A Pennsylvania case holds that no liability rests upon the city by reason of an excavation in the street that caused injury to one using the street, where the excavation was made by one under an independent contract with the abutting owner and in pursuance of a city permit. *Levenite v. Lancaster* (1906), 215 Penn. 576; 64 Atl. 782. Where an excavation in the public street is temporarily and loosely filled by the independent contractor under the supervision of the city's representative and pending the arrival of materials, it is held that the city must exercise a continuing duty to keep it safe for travel. *Newman v. New York* (1908), 57 Misc. (N. Y.), 636; 108 N. Y. Supp. 676.

⁸⁷ *TURNER v. NEWBURGH* (1888), 109 N. Y. 301; 16 N. E. 344; 49 Amer. St. Rep. 453. Where pav-

ing materials are placed in a street by the paving contractor with the city's express permission it is liable for the contractor's negligent failure to properly guard and light the obstruction, since by giving the permit, it became charged with the positive duty to see that the proper precautions were taken, which apparently cannot be delegated by the contract providing that the contractor shall maintain proper guards, etc. *Godfrey v. New York* (1905), 104 App. Div. 357; 93 N. Y. Supp. 899, affirmed (1906), 185 N. Y. 563; 77 N. E. 1187.

⁸⁸ *Smith v. St. Joseph* (1890), 42 Mo. App. 392; *Indianapolis v. Marold* (1900), 25 Ind. App. 428; 58 N. E. 512; *ATCHISON CO. v. SULLIVAN* (1898), 7 Kans. App. 152; 53 Pac. 142; 4 Amer. Neg. Rep. 149; *Brusso v. Buffalo* (1882), 90 N. Y. 679. Cf., *OMAHA v. JENSEN* (1892), 35 Nebr. 68; 52 N. W. 833; 37 Amer. St. Rep. 432.

been held that a city may delegate its duty to keep its streets in a reasonably safe condition, so as to escape liability.⁹⁵

Sec. 142. Same, Constructing Sewers.

A city is liable for injuries sustained by reason of the lack of suitable barriers around a sewer trench, although the sewer is being constructed under a contract which made it the duty of the contractor to erect such barriers.⁹⁶ The plaintiff has been held entitled to recover, in numerous cases, damages for injuries received through the contractor's negligence in excavating for sewers, etc.⁹⁷ On the ground

consent, was left stretched one and a half feet above the street, while not in use, for half an hour in the evening; plaintiff passing along fell over it and was injured. It was held that the city would be liable only when it had reasonable notice of such defect or might have known of it by proper diligence and that this was not shown. *Craig v. Inhabitants, etc.* (1908, Mass.), 85 N. E. 855.

⁹⁵ *Hepburn v. City* (1892), 149 Penn. St. 335; 24 Atl. 279; 33 Am. St. 482; 152 R. A. 821; *Painter v. Mayor* (1863), 46 Penn. St. 213. The Newfoundland courts hold that in the absence of a statute the municipal Board of Works was not obliged to keep a certain road in repair, and hence was not liable to one who drove against a gravel pile negligently left in the road by a contractor employed to repair the road. *Duchemin v. Board, etc.* (1880), Newf. R. 236.

⁹⁶ *OMAHA v. JENSEN* (1892), 35 Nebr. 68; 52 N. W. 883; 37 Amer. St. Rep. 432.

⁹⁷ *DOOLEY v. SULLIVAN* (1887), 112 Ind. 451; 14 N. E. 566; 2 Amer. St. Rep. 209; *WILSON v. WHEELING* (1882), 19 W. Va. 323; 42 Amer. Rep. 780; *Butler v. Bangor* (1877), 67 Me. 385. The fact that an injury received by a person who fell into a sewer trench which crossed the street along which he was walking resulted from the momentary failure of the servants of a street railroad company to replace the barriers which they were instructed to remove whenever a car passed, does not relieve the defendant from liability; for if the municipality sees fit to intrust to them the duty of keeping the trench properly guarded, it is answerable for their negligence, momentary or otherwise. *Blessington v. Boston* (1891), 153 Mass. 409; 26 N. E. 1113. Where one who had contracted with the water board of a city to build a sewer was required, by the terms of the contract to remove the sheath-piling, and in consequence of doing so an adjacent house

by license or otherwise, which constitutes a nuisance and which may seriously interfere with a reasonable use of such ways by travelers in the ordinary modes, no good reason can be advanced to excuse municipal liability, in event of damage resulting directly from such nuisance."⁹²

In jurisdictions, where there is no duty resting upon the corporation to keep the streets in proper repair, there is no liability for acts of negligence of a public officer engaged in the construction of a street.⁹³ The act of a person under a contract to deliver lumber to a city, in piling the lumber in a street, is not the act of the city, and in the absence of notice of the presence of the lumber, it is not liable in damage to one injured thereby.⁹⁴ In Pennsylvania it has

⁹² McQuillan's *Munic. Ordinances*, Sec. 437, where the subject is exhaustively discussed and numerous cases cited. Defendant city had an independent contractor build a subway, requiring the shifting of a railway track; this the contractor did without negligence and placed planks between the tracks, and turned same over to the city; passing vehicles wore off the planks and a bicyclist was injured; the city was held liable, it being its duty to keep its streets in repair. *Rimby v. Philadelphia* (1904, Penn.), 57 Atl. 347; 16 Amer. Neg. R. 608, n.

⁹³ *Jensen v. Waltham* (1895), 166 Mass. 344; 44 N. E. 339, assistant superintendent of streets; *McCann v. Waltham* (1895), 163 Mass. 344; 40 N. E. 20, laborer employed by superintendent of streets. The principal employer was held not to be responsible where plaintiff had fallen into an open trench which had been dug

in a street by permission of the authorities (and hence was not *per se* a nuisance). See *Smith v. Simmons* (1883), 103 Penn. 32; 49 Amer. Rep. 113. In a later case growing out of the same accident, the municipality which had granted the license was held not responsible, and the general rule was laid down that such a corporation when it grants to one a license for a purpose proper and lawful is not liable to one injured by reason of the misuse or abuse of that license whether the same be by an independent contractor for the work from the licensee, or by the licensee himself. *SUSQUEHANNA DEPOT v. SIMMONS* (1886), 112 Penn. 384; 5 Atl. 434; 56 Amer. Rep. 317.

⁹⁴ *EVANSVILLE v. SENHENN* (1897), 151 Ind. 42; 47 N. E. 634; 51 N. E. 88; 41 L. R. A. 728; 68 Amer. St. Rep. 218. A rope attached to a building being moved through a street, with the city's

acts it was not responsible. "Property owners, engaged in work on a city street, in obedience to the requirements of an ordinance, are not contractors exercising an independent employment, over whom the municipal authorities have no control."¹⁰⁰ When a city, acting within its general powers to improve streets, makes a contract for grading a street, by which the contractors in consideration of doing such grading are to receive and appropriate to their own use all the stone in the street, and the contractors accordingly proceed to remove the stone, the city is responsible for their acts in the premises.¹⁰¹ On the other hand, it was declared that where a contractor in paving a street unnecessarily deposits earth upon an abutting lot, the corporation is not liable to the lot owner.¹⁰²

¹⁰⁰ *MEYERS v. CITY OF PHILADELPHIA* (1907), 217 Penn. 159; 66 Atl. 251; 10 L. R. A. (N. S.), 678, citing *Trego v. Honeybrook* (1894), 160 Pa. St. 76; 28 Atl. 639. Where the excavation work incident to carrying out a contract for the grading of a street was so negligently done that a large amount of water was collected against plaintiff's wall, the defendant city was held liable on the ground that the work was done under the directions of its surveyor, in accordance with a power expressly reserved in the contract. *Lacour v. New York* (1854), 3 Duer (N. Y.), 406.

¹⁰¹ *RICH v. MINNEAPOLIS* (1887), 37 Minn. 423; 35 N. W. 2; 5 Amer. St. Rep. 861.

¹⁰² *Fuller v. Grand Rapids* (1895), 105 Mich. 529; 63 N. W. 530. So, also, the fact that a city fails to include in a contract

for the grading of a street, a provision that the contractor shall care for and remove all surface water, sewage and drainage which would be interfered with by such grading, does not render the city liable for the negligence of the contractor in failing to provide for the removal of surface water and sewage. *White v. New York* (1897), 15 App. Div. (N. Y.), 440; 44 N. Y. Supp. 454. Where a city in grading a street finds it necessary to build a retaining wall and the work is done by a contractor, it is liable for an encroachment upon an adjoining owner's land and for damages caused by using poor material, where the contract provided that the wall should be placed where indicated on the plans prepared by the city and the materials used should be subject to the inspection of the commissioner of street

that the work of dredging out a canal for a city was done by an independent contractor, the city was held not liable to one for the flooding of his fields thereby, by the building of a dam without constructing a by-pass to carry off the water, though the city had an inspector of the work who located the dam.⁹⁸

Sec. 143. Same, Grading Street.

Where a contractor raised the grade of a street, in accordance with an ordinance and the plans and specifications thereunder and as a consequence dirt and sand were deposited on the plaintiff's lot, the city was held liable for the damage, notwithstanding the employment of a contractor; since the injury was caused, not by the contractor's method of doing the work, but by his following the instructions given him.⁹⁹ A municipal corporation can not escape liability for injury caused by refuse left piled in the street upon the completion of the work of re-setting a curb, upon the theory that the work being done by the abutting owner at its direction, was by an independent contractor for whose

settled and was injured, the city was held liable for the damages. *Lockwood v. New York* (1858), 2 Hilt. (N. Y.), 66. In England it is held that a district council, in the construction of a sewer, owes the duty to an abutting owner of doing the work so as not to injure a gas main and cause the escape of gas into his house so as to cause an explosion therein, and it cannot escape liability for such an injury under the plea that it had delegated the work to an independent contractor. *Hardaker v. Idle District Council* (C. A., 1896), 1 Q.

B. D. 335; 65 L. J., Q. B. (N. S.), 363. Where there was evidence that a fifteen-year-old boy while on an errand at night and attempting to cross a street diagonally fell into an excavation for a sewer and was injured, the city was held liable, and it was no defense that the work was done by a contractor. *Baker v. Grand Rapids* (1897, Mich.), 1 Amer. Neg. Rep. 90, citing cases.

⁹⁸ *White v. Philadelphia* (1902), 201 Penn. 512; 51 Atl. 332.

⁹⁹ *East St. Louis v. Murphy* (1899), 89 Ills. App. 22.

unless notice, actual or constructive, is established.¹⁰⁷ A municipal ordinance duly enacted, requiring an abutting owner to build a sidewalk in front of his premises, subject to the city's supervision and obligating the city to pay part of the cost, was held not to render the city liable for the negligence of the owner's contractor in so placing a barrier around the walk that a passerby fell over it. The city, it was said, would be liable only for failing to put the walk in condition after due notice.¹⁰⁸

Sec. 146. Same, Contractor's Trespasses.

A city council, empowered to abate nuisances and also to improve the channel of a river within the city limits, passed an ordinance declaring a part of the river in the city limits a public nuisance, and providing for its abatement by excavating a new channel across plaintiff's lot. Afterwards, under a contract duly let, acts were done by the contractor constituting a trespass on plaintiff's land. The city was held liable, the council's action being within

¹⁰⁷ *PETTENGILL v. YONKERS* (1889), 116 N. Y. 558; 22 N. E. 1095; 15 Amer. St. Rep. 442; *TURNER v. NEWBURGH* (1888), 109 N. Y. 301; 16 N. E. 344; 4 Amer. St. Rep. 453; *EVANSVILLE v. SENHENN* (1898), 151 Ind. 42; 47 N. E. 634; 51 N. E. 88; 41 L. R. A. 728; 68 Amer. St. Rep. 218, in which case a person who had contracted to deliver lumber had piled it insecurely in a street; *Sweet v. Gloversville* (1877), 12 Hun (N. Y.), 302, in which plaintiff was injured by stepping in a sidewalk depression caused by uneven grading and he claimed the injury was caused not by negligence in doing the work but

by reason of leaving the abrupt descent unguarded; the court held the lack of evidence authorizing the jury to find that the city had notice of the defect was fatal to the plaintiff's claim.

¹⁰⁸ *Thompson v. West Bay City* (1904), 137 Mich. 94; 100 N. W. 280; 16 Amer. Neg. R. 607, n. Cf., *Wright v. Muskegon* (1905), 140 Mich. 215; 103 N. W. 558, wherein the failure of one building a sidewalk under a county contract, to place guards and lights, was held not negligence for which the city was responsible, where it exercised no supervision over the work.

Sec. 144. Same, as to Bridges,

A municipality has been held not liable for injuries occasioned by the collapse of a bridge while it is under construction by an independent contractor.¹⁰³ But a city was held liable where an injury was due to the dangerous condition of a highway bridge under repair owing to its not having been barricaded.¹⁰⁴

Sec. 145. Same, Necessity as to Notice.

In those cases in which the person doing the work in question was a contractor employed by the city itself and in which the danger, which resulted in the injury was a *necessary* incident of the operations, it is not prerequisite to recovery that the city should have received special notice of the dangerous conditions.¹⁰⁵ So also where the dangerous conditions were inseparably connected with work performed with the city's express sanction, though not by one contracting with it, *e. g.*, a gas company laying pipe through the streets, and leaving an excavation therefor unguarded.¹⁰⁶ On the other hand, it is sometimes said that if the tortious act which created the danger was *collateral* in its nature, the city is not chargeable with responsibility

improvements and it appeared that the wall was built under a city inspector's supervision. The failure of such owner to protest at the time of building the wall will not estop him from claiming damages. *Goldschmid v. Mayor, etc.* (1897, N. Y. App. Div.), 1 Amer. Neg. Rep. 508.

¹⁰³ *Wood v. Watertown* (1890), 58 Hun (N. Y.), 298; 11 N. Y. Supp. 864.

¹⁰⁴ *Hawxhurst v. New York*

(1887), 43 Hun, 588. As to counties, see Sec. 147.

¹⁰⁵ *Brusso v. Buffalo* (1882), 90 N. Y. 679; *Birmingham v. McCrary* (1887), 84 Ala. 469; 4 So. 630; 27 Cent. Law J. 598; *OMAHA v. JENSEN* (1892), 35 Neb. 68; 52 N. W. 833; 37 Amer. St. Rep. 432; *Sterling v. Schiffmacher* (1893), 47 Ills. App. 141.

¹⁰⁶ *RUSSELL v. COLUMBIA* (1881), 74 Mo. 480; 41 Amer. Rep. 325.

Sec. 148. Public Utilities Companies.

In a head note by the court, it has recently been stated: "As a municipal corporation would itself be liable to a citizen for injury sustained by reason of its reducing a sidewalk to a dangerous condition, it is evident that the privilege, granted by it to a public utility company, of making excavations therein can not authorize such company to leave the excavations so made unguarded, and to dispense with all precautions whereby those who are rightfully using the sidewalk may be warned of their existence. Nor can the company, in such case, escape liability on the plea that an excavation made under the authority conferred on it and for its account and benefit has been made by an independent contractor."¹¹³ Where a gas company was licensed to distribute heavy gas pipes in the street it was held charged with the duty of blocking them so as to avoid injury to children playing in the street, and it can not delegate such duty to an independent contractor.¹¹⁴

Sec. 149. Public Charities.

A very eminent authority¹¹⁵ has stated that "there are these diverse holdings, upon the question whether a public charitable corporation or trust is liable for the negligence or other torts of its agents and servants," (1) . . . ;

¹¹³ *ROCK v. AMERICAN CONSTRUCTION Co.* (1908), 120 La. 831; 45 So. 741; 14 L. R. A. (N. S.), 653. The non-delegable quality of a carrier's duties is the basis of certain rulings to the effect that a steamship company is liable for the negligence of stevedores in regard to bringing on board and placing in a certain part of the ship a passenger's baggage, and for an assault on a

passenger committed by one contracting with it to carry their baggage by tugs to its steamers. *The Dresden* (1894), 62 Fed. 438; *Barrow Steamship Co. v. Kane* (1898), 88 Fed. 197.

¹¹⁴ *O'HARA v. LACLEDE, ETC., Co.* (1903), 131 Mo. App. 428; 110 S. W. 642.

¹¹⁵ *Huffcut on Agency*, 2d ed., Sec. 261.

its general powers and taken in the belief that it was exercising a lawful power for the public good.¹⁰⁹

Sec. 147. Counties.

The liability of cities for dangerous condition of their streets being constructed or repaired by independent contractors, has been applied to counties and shires.¹¹⁰ And where a contractor turns over a bridge to the proper county authorities and they accept it as a discharge of his contract, they thereby become responsible to the traveling public for its safe condition; and if a traveler is injured by reason of its defective condition, he has an action against the county, provided such an action is given by the statute under other circumstances.¹¹¹ In Pennsylvania a county was held not liable where an injury was received by a person who turned aside to avoid a pile of earth on a pavement and fell into a trench, dug for the purpose of laying a curbstone.¹¹²

¹⁰⁹ *Hamilton v. Fond du Lac* (1876), 40 Wisc. 47.

¹¹⁰ *Park v. Adams Co.* (1891), 3 Ind. App. 536; 30 N. E. 147; but see *Board, etc., v. Allman* (1895), 142 Ind. 573; 42 N. E. 206. *ANNE ARUNDEL CO. v. DUVAL* (1880), 54 Md. 350; 39 Amer. Rep. 393; *Bell v. Portland* (1876), 2 Vict. L. R. 197. Thus, a county was held liable where the dangerous condition complained of arose from not guarding a bridge the floor of which was being laid. *Park v. Adams Co.*, *supra*; *contra*, *Board, etc., v. Allman*, *supra*.

¹¹¹ *Vickers v. Cloud Co.* (1898), 59 Kans. 86; 52 Pac. 73. As to the liability of the county for the acts of subordinate agents, see *Abbett v. Johnson Co.* (1887), 114 Ind. 61.

¹¹² *Eby v. Lebanon Co.* (1895), 166 Penn. 632; 31 Atl. 332. A highway board instructed its surveyor to employ a certain contractor to repair a road. In the course of the work, with which the board did not interfere, the contractor's servants left stones on the highway at night, without placing a light to show where they were and a traveler drove against the obstruction and was injured. The court held there was no evidence of negligence on the part of the highway board or its surveyors, but did not touch upon the duty of the board to keep the highway safe for travel as being primary and non-delegable. *Reid v. Darlington, etc.*, *Board* (1877), 41 J. P. 581, Q. B. D.

class of cases seems to be the one most generally acceptable, namely, that while a charitable corporation may be liable for negligence in the performance of a corporate duty, the doctrine of *respondeat superior* is not applicable to it so as to render it liable for the torts of its servants.¹²¹ This is merely an extension to charities of a doctrine sometimes applied, that officers or trustees for public purposes are exempt from liability for torts of servants but not for their own torts; qualified by the further consideration that some duties are imposed upon public bodies in such a way that they can not rid themselves of liability by putting the performance of the duty into hands of servants.¹²² Under this view a charitable hospital, for example, has imposed upon it the duty to use due care to provide safe and suitable hospital appliances and skilled and competent physicians, surgeons and nurses, and for a failure to fulfill this duty it would be liable to one injured thereby; but having fulfilled this duty, it is not liable for the negligence of such attendants or servants.¹²³ It is further to be noted that physicians and surgeons are not the servants of the hospital or other body that furnishes them and that in any event liability can attach only for negligently furnishing incompetent practitioners.¹²⁴ Two classes of corporations or agencies must be distinguished. First, where a corporation or board of managers exercises governmental powers as an

Woman's Hospital (1895), 89 Hun (N. Y.), 73; VanTassell v. Manhattan, etc., Hospital (1891), 39 N. Y. St. R. 781; 15 N. Y. Supp. 620; HEARNS v. WATERBURY HOSPITAL (1895), 66 Conn. 98; 33 Atl. 595; 31 L. R. A. 224; EIGHMY v. UNION PACIFIC R. (1895), 93 Iowa, 538; 61 N. W. 1056; 27 L. R. A. 296; Richardson v. Carbon, etc., Co., *supra*.

¹²¹ "See the very full and able discussion of Hammersley, J., in HEARNS v. WATERBURY HOSPITAL," *supra*.

¹²² Citing Mersey Docks v. Gibbs (1864), L. R., 1 H. L. 93.

¹²³ Citing Union Pacific Railway v. Artist, *supra*; Hearns v. Waterbury Hospital, *supra*.

¹²⁴ Citing Huff. Agcy., 2d ed., Sec. 232.

"(2) The doctrine that the charitable funds can not be reached in payment of damages for torts, has been doubted or repudiated by other courts, but there has been no agreement as to the nature and extent of the liability of the charity. (a) The general doctrine of *respondeat superior* has been applied and the charity held like any other master for the torts of servants.¹¹⁶ (b) This general doctrine has been admitted but it has been held that one accepting the services or bounty of the charity is a mere licensee and must take the service as he finds it, that is 'that there is no liability on the part of the charitable corporations, arising out of the administration of the charity, to those who accept their bounty.'¹¹⁷ Under this doctrine there is a further divergence of opinion as to whether one who pays for the service is a recipient of the bounty. One case holds that he is, treating the payment as a mere contribution to charity.¹¹⁸ Other cases seem to regard the payment as imposing a special duty toward the payer for breach of which an action will lie.¹¹⁹ (c) The general doctrine of *respondeat superior* has not been admitted, and recovery is limited to those cases where it is shown that the administrators of the charity were themselves negligent in the appointment of incompetent servants or in the discharge of some other corporate or specially imposed duty.¹²⁰ The theory of this

¹¹⁶ Citing *GLAVIN v. RHODE ISLAND HOSPITAL* (1879), 12 R. I. 411; 34 Amer. Rep. 675; *Foreman v. Mayor* (1871), L. R., 6 Q. B. 214. "See, also, *Donaldson v. Commissioners* (1890), 30 New Brunsw. 279."

¹¹⁷ Citing *Powers v. Massachusetts, etc., Hospital* (1899), 101 Fed. 896. "And see *Gooch v. Association* (1872), 109 Mass. 558."

¹¹⁸ Same cases last cited.

¹¹⁹ Citing *Ward v. St. Vincent's Hospital* (1899), 39 N. Y. App. Div. 624; 57 N. Y. Supp. 784; *Richardson v. Carbon, etc., Co.* (1893), 6 Wash. 52; 10 Wash. 648; 20 L. R. A. 338. "See *Glavin v. Rhode Island Hospital, supra*."

¹²⁰ Citing *McDONALD v. MASSACHUSETTS, etc., HOSPITAL* (1876), 120 Mass. 432; 21 Amer. Rep. 529; *Union, etc., R. v. Artist* (1894), 60 Fed. 365; *Joel v.*

recent case, defendants, trustees, "were serving without compensation in the supervision of a home for indigent boys, which was established for the purpose of enabling them to become self-supporting and efficient members of society; their duty to plaintiff in the exercise of this position did not extend beyond the requirements of using reasonable care to select competent servants, and the demands of substantial justice are met, if as charitable trustees they are not charged with the negligence of those so employed." ¹²⁸

In another more recent case a church owned and possessed certain real estate on which it was erecting a building for church purposes, and caused to be erected a scaffolding therein for its employees and others engaged in erecting the church; plaintiff was employed by a contractor, who had contracted with defendant to tint the ceiling and walls, and in such service, while properly using the scaffolding, plaintiff was, because of its defective condition, thrown to the floor and injured. The defense was that being a charity, defendant was not liable, but the court said, after reviewing and distinguishing very many cases: "The defendant corporation is a legal entity with which the law has to deal. It uses, in the accomplishment of its objects, property which it owns and manages and in such management it acts by and through chosen agents. Incident to such management are duties which, unperformed or badly performed, may support corporate obligations. Property conveyed to it, generally, is presumed to be conveyed for the statute purposes of its organization, and is subject to the risks of corporate management." ¹²⁹

63 Md. 20; *Downes v. Harper Hospital* (1894), 101 Mich. 555; 60 N. W. 42; 45 Amer. St. Rep. 427; *Pepke v. Grace Hospital* (1902), 130 Mich. 493; 90 N. W. 278. "This decision would seem

to be clearly correct." Note to 8 Amer. & Eng. Ann. Cas. 1111.

¹²⁹ *BRUCE v. CENTRAL M. E. CHURCH* (1907), 147 Mich. 230; 110 N. W. 951; 11 Amer. & Eng. Ann. Cas. 151 (per Ostrander, J.,

agent of the state or municipality, it falls under the head of public agencies.¹²⁵ Second, private corporations organized for the protection of some interest of their supporters, as a 'protective association,' supported by insurance companies, are not public charities merely because they incidentally render aid gratuitously to outsiders."¹²⁶

The funds and property of a university organized as a private corporation without power to declare dividends and dependent on the income from its property and upon gifts and endowments to carry out its purposes of disseminating learning to all persons of good character and suitable proficiency, are held in trust and can not be diverted to pay damages to a student losing an eye through the negligent act of a professor while discharging his duties.¹²⁷ In a very

¹²⁵ Citing *CITY OF RICHMOND v. LONG* (1861), 17 Gratt. (Va.), 375; 94 Amer. Dec. 461; *BENTON v. TRUSTEES* (1885), 140 Mass. 13; 54 Amer. Rep. 436; *WILLIAMSON v. LOUISVILLE, ETC., SCHOOL* (1894), 95 Ky. 251; 44 Amer. St. Rep. 243.

¹²⁶ Citing *NEWCOMB v. BOSTON, ETC., DEPARTMENT* (1890), 151 Mass. 215; 24 N. E. 39; 6 L. R. A. 778. Cf., *FIRE INSURANCE PATROL v. BOYD* (1888), 120 Penn. St. 624; 6 Amer. St. 745; 15 Atl. 553; *Chapin v. Holyoke, etc., Association* (1896), 165 Mass. 280; 42 N. E. 1130; see, also, *Wabash, etc., R. v. Kelly* (1899), 153 Ind. 119.

¹²⁷ *PARKS v. NORTHWESTERN UNIVERSITY* (1905), 218 Ills. 381; 75 N. E. 991; 4 Amer. & Eng. Ann. Cas. 103. "The only case we find in this country expressing a contrary view is *GLAVIN v.*

RHODE ISLAND HOSPITAL (1879), 12 R. I. 411; 34 Amer. Rep. 675, and since that decision the legislature of Rhode Island has, by appropriate enactment, created the exemption here contended for by the appellee university as to all hospitals whose funds are exclusively devoted to charitable purposes. Gen. Laws of Rhode Island, Chap. 177, Sec. 38." Per Boggs, J. "The view taken in the Rhode Island decision was approved in *Donaldson v. Hospital* (1890), 30 New Brunsw. 279. See, also, *Breux v. Montreal* (1896), 9 Queb. (S. C.), 503." Note in 4 Amer. & Eng. Ann. Cas. 106.

¹²⁸ *FARRIGAN v. PEVEAR* (1906), 193 Mass. 147, 151; 78 N. E. 865; 8 Amer. & Eng. Ann. Cas. 1109; 118 Amer. St. Rep. 484, citing *inter alia*, *Heriot's Hospital v. Rose* (1846), 12 Cl. & F. 507; *Perry v. House of Refuge* (1884),

where it has exercised reasonable care in selecting its employees." ¹³⁰ "Some cases, however, hold that a private charitable institution is not liable for the negligence of its servants in any event, as the funds of a charitable trust can not be thus diverted from the purposes of a donor." ¹³¹

The question of the personal liability of a superior officer of an eleemosynary institution maintained by the state for the tort of his subordinate seems to be passed on for the first time, in a recent Kentucky case ¹³² holding that the superintendent of a state lunatic asylum is not, under the doctrine of *respondeat superior*, responsible for injuries inflicted upon inmates of the asylum by employees whom he appointed.

Sec. 150. Public Exhibitions.

A street railway company was held liable for an injury received by a spectator at an exhibition of marksmanship given at a pleasure resort owned and advertised by it, although the performance was provided and conducted by an independent contractor. ¹³³ The Court of Queen's Bench

¹³⁰ Note to *BRUCE v. CENTRAL M. E. CHURCH*, *supra*, in 11 Amer. & Eng. Ann. Cas. 160, citing Illinois, etc., Railroad v. Buchanan (1907), 103 S. W. 272; 31 Ky. L. R. 722; Noble v. Hahneman Hospital (1906), 112 N. Y. App. Div. 663; 98 N. Y. Supp. 605. "See, also, Louisville University v. Hammock (1907, Ky.), 106 S. W. 219; Gitzenhoffen v. Sisters, etc., Association (1907), 32 Utah, 46; 88 Pac. 691."

¹³¹ *BRUCE v. CENTRAL M. E. CHURCH*, *supra*, citing in same note *Fordyce v. Woman's, etc., Association* (1906), 79 Ark. 559;

96 S. W. 155; *Adams v. University Hospital* (1907), 122 Mo. 675; 99 S. W. 453; *Ahston v. Waldon Academy* (1907), 118 Tenn. 24; 102 S. W. 351; *contra*, *Hewett v. Woman's, etc., Association* (1906), 73 N. H. 556; 64 Atl. 190, holding, under statute, a hospital liable for its manager's negligent injury to its servant.

¹³² *Ketterer v. Kentucky State Board, etc.* (1909, Ky.), 115 S. W. 200; 20 L. R. A. (N. S.), 274.

¹³³ *THOMPSON v. LOWELL STREET R.* (1898), 170 Mass. 577; 49 N. E. 913; 40 L. R. A. 345; 64 Amer. St. Rep. 323. Where portions of

"A majority of the recent cases deciding the question of the liability of a private charitable institution for the negligence of its employers uphold the rule that it is not liable

Blair, J., concurring); citing *inter alia*, *Donnelly v. Boston, etc., Cemetery* (1888), 146 Mass. 163; 15 N. E. 505; *Shepard v. Creamer* (1884), 160 Mass. 496; 36 N. E. 475; *McAllister v. Burgess* (1894), 161 Mass. 271; 37 N. E. 173; *Davis v. Central Congregational Society* (1880), 129 Mass. 367; 37 Amer. Rep. 368; *Church, etc., v. Buckhart* (1842), 3 Hill (N. Y.), 193; *contra*, *Haas v. Missionary Society* (1893), 6 Misc. (N. Y.), 281; 20 N. Y. Supp. 868. In a separate opinion by Carpenter, J., in which five other justices concurred, it is said, p. 250: "We are compelled to hold that funds devoted to a religious purpose are charitable trust funds. I conclude, therefore, that we cannot hold the principle in *Downes v. Harper Hospital* (1894), 101 Mich. 555, 60 N. W. 42, 45 Amer. St. Rep. 427, inapplicable, upon the ground that the church funds are not charitable trust funds." (The court distinguished the *Downes* case from the one at bar, on the ground that in the former he was a beneficiary of the charity and in the latter an employee of defendant's contractor.) "We receive great aid (in determining the principle underlying the *Downes* case) by examining similar decisions made by other courts. Among those decisions are *RICHMOND v. LONG* (1867), 17 Gratt.

(Va.), 375; 94 Amer. Dec. 461; *Collins v. New York, etc., Medical School* (1901), 59 N. Y. App. Div. 63; 69 N. Y. Supp. 106; *Connor v. Sisters, etc.* (1900), 10 Ohio Dec. 86; 7 Ohio (N. P.), 514," and others cited in this connection in this work. Continuing, the court says (page 253): "The ground on which liability is denied in nearly all the foregoing cases is that . . . it would oppose the will of the founder of the trust to pay from the trust funds damages caused by an agent's torts. . . . But I can see no ground upon which it may be held that the rights of those who are not beneficiaries of a trust can in any way be affected by the will of its founders. The rights of such persons are those created by general laws and the duties of those administering the trust to respect those rights are also created by general laws. . . . I conclude from this reasoning that corporations administering a charitable trust, like all other corporations, are subject to the general laws of the land and can not, therefore, claim exemption from responsibility for the torts of their agents, unless that claim is based on a contract with the person injured by such tort. . . . The principle of non-liability declared in the *Downes* case is limited to those who are beneficiaries of a trust fund."

work, is not enjoyed by corporations *for profit*, such as turnpike companies. But it is questionable whether there is any such distinction.¹³⁶

¹³⁶ LANCASTER AVENUE, ETC., Co. v. RHODES (1887), 116 Penn. St. 377; 9 Atl. 852; 2 Amer. St. Rep. 608. "But when certain powers and privileges have been specifically conferred by the public upon an individual or corporation, for private emolument, in consideration of which certain duties affecting public health or the safety of the public travel have been expressly assumed, the individual in

receipt of the emoluments cannot be relieved of liability by committing the performance of these duties to another. In such cases liability cannot be evaded by showing that the injury resulted from the fault or neglect of a third person employed to perform these public duties." Clark, J., in LANCASTER, ETC., Co. v. RHODES, *supra*, quoted in Barrows on Neg., 165.

has ruled that when a man causes a building to be erected for viewing a public exhibition and admits persons on payment of money, the contract between him and the persons admitted is analogous to the contract between a carrier and his passengers, that there is implied in such a contract a warranty not only of due care on the part of himself and his servants, but also of due care on the part of any independent contractor who may have been employed by him to construct the means of conveyance or support. The plaintiff, who had paid admission, it was held, could recover against the defendant for damages sustained by reason of the stand having been negligently and improperly constructed, although not to the knowledge of defendant who, personally, was free from all negligence and had employed a competent person to erect the stand.¹³⁴ On the other hand, a street railway company, owning a park, was recently held not liable to a visitor for injuries due to negligence in shooting off rockets, where all the work in connection with sending off the fireworks was done by another person under a contract with the street railway company to give the exhibition, and the street railway company had no control over the details of the work nor over the men who performed it.¹³⁵

Sec. 151. "Profit" Corporations.

It has been said that the immunity which in certain cases is enjoyed by municipal corporations in respect of liability for the negligence of independent contractors of public

a platform and staircase used at a public exhibition gave way and injured plaintiff, he was held entitled to recover though it appeared they were erected by an independent contractor. *Fox v.*

Buffalo Park (1897), 21 App. Div. 321; 47 N. Y. Supp. 788.

¹³⁴ *Francis v. Cockrell* (1870), L. R., 5 Q. B. 184, affirmed, p. 501.

¹³⁵ *Deyo v. Kingston, etc., R.* (1904), 88 N. Y. Supp. 487.

ages by reason of excavations made by them in laying pipes, and to be responsible for all damages which might occur by reason of the neglect of their employees in the premises." The company let out the work to a contractor. The latter used a steam drill in such manner as to frighten a traveler's horse and injure the traveler. An action by the traveler against the company was supported upon the plain ground that they could not evade a liability which they assumed by contract, by shifting over to another the work which they had undertaken to perform.² The employer may bargain with the contractor that he shall perform a non-delegable duty and stipulate for an indemnity from himself if it is not properly performed; but the employer can not thereby relieve himself from liability to those injured by the contractor's failure to perform it.³ A contract providing that said "contractor should maintain the sidewalks along said street during the construction of said improvement safe for

² *WATER CO. v. WARE* (1872), 16 Wall. (U. S.), 566. "If the employer by express contract has agreed to do an act efficiently and safely, he cannot, by sub-letting the work to an independent contractor, relieve himself from liability under his express contract. Thus, where a company undertook to lay water pipes in a city, and agreed with the city to protect all persons from damages and to be responsible for damages to all persons, and afterwards sub-let the work to a contractor, who, in using a steam drill injured a passenger, it was held that the company was liable." Huff. Agcy., 2d ed., Sec. 223, citing *WATER CO. v. WARE*, *supra*. But the city will be liable to the owner of property injured by the

negligent manner in which a contractor conducts the work where the city contracts with the owner of the property for a right of way and agrees to pay all damages occasioned by the construction, *Leeds v. Richmond* (1885), 102 Ind. 372; 1 N. E. 71.

³ *Dalton v. Angus* (1881), L. R., 6 App. C. 740, 829; 7 Am. Neg. R. 157, n.; *Hughes v. Percival* (1883), L. R., 8 App. C. 443. *Contra*, *Osborn v. Union*, etc. (1869), 53 Barb. (N. Y.), 629, holding such stipulation relieves the employer, relying on *BUFFALO v. HOLLOWAY* (1852), 7 N. Y. 493; 57 Amer. Dec. 550, and *STORRS v. UTICA* (1858), 17 N. Y. 104; 72 Amer. Dec. 437. But this is criticised. See note to *JACOBS v. FULLER* (1902), 65 L. R. A. 841.

CHAPTER VI.

EMPLOYER'S EXCEPTIONAL LIABILITY—III. CONDUCT OF EMPLOYER.

SECTION

- 160. Liability under express contract.
- 161. Same—Effect of statute.
- 162. Same—Duty to contract.
- 163. Contract for defective plans.
- 164. Selecting contractor, generally.
- 165. Same—Degree of care.
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- 167. Identity of employer and contractor.
- 168. Employer wrongfully interfering.

SECTION

- 169. Same—What amounts to interference.
- 170. Employer reserving control.
- 171. Same—Partly doing work.
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- 173. Employer accepting work.
- 174. Same—What is acceptance.
- 175. Same—Knowledge of condition.
- 176. Same—Work abandoned by contractor.
- 177. Contractor generally exempt.

Sec. 160. Liability Under Express Contract.

The principle of exemption can not be appealed to to enable one to violate express contracts into which he has entered. One who enters into a valid contract to do a certain thing must do it or pay damages for its breach; and he can not ordinarily excuse himself from paying damages by pleading inevitable accident, *vis major*, or the like. In general, nothing but the wrong of the opposite contracting party can be invoked to excuse non-performance.¹ An incorporated company undertook to lay water pipes in a city, agreeing with the city "to protect all persons against dam-

¹ Gray v. Pullen (1864), 5 Best. & S. 985; 7 Am. Neg. R. 158, n.

the city from liability for the acts of the contractor.⁷ So also, under the Georgia Code, sec. 671, a bond taken by a county from a contractor erecting a bridge for the county, to keep it in repair, exempts the county from liability for damages, during the period covered, for injuries in consequence of its defective condition.⁸ But a Pennsylvania statute directing that the township supervisor shall award a contract for making and repairing a road therein to the lowest and best bidder, was held not to exempt the township from liability for defects in the road due to the contractor's acts or acts or omissions.⁹

Sec. 162. Same, Duty to Contract.

In a California case, the plaintiff contended it was the defendant's duty to expressly stipulate with his independent contractor that the work should be so conducted and completed as to leave undisturbed the soil on plaintiff's adjoining lot, and that failing so to provide, defendant was liable, the work having been done according to contract. The court held: "When a contract provides for doing a thing which may be, and generally is, done in a lawful manner and is silent as to the mode of doing it, the contract is to be construed as requiring it to be done in a lawful manner. As the injury was caused by the contractor while doing work which it must be assumed, could have been done with-

⁷ *JAMES V. SAN FRANCISCO* (1856), 6 Cal. 528; 65 Amer. Dec. 526, unlighted excavation; *O'Hale v. Sacramento* (1874), 48 Cal. 212, same facts; *Krause v. Sacramento* (1874), 48 Cal. 222, defective sidewalk.

⁸ *Mappin v. Washington Co.* (1893), 92 Ga. 130; 17 S. E. 1009. But failure to take such

bond does not make the county liable. *Dougherty Co. v. Newsom* (1899), 107 Ga. 811; 33 S. E. 660.

⁹ *Mahanoy Township v. Sholly* (1877), 84 Penn. 136. Cf., *DETROIT V. COREY* (1861), 9 Mich. 165; 80 Amer. Dec. 78, Campbell, J., dissenting.

travel by the general public and that he should properly guard all places of danger along said street during the construction of said improvement," does not absolve the city from injuries resulting directly from the acts the contractor agreed and was authorized to do, and from work of such character as to render the sidewalk unsafe for public travel.⁴

"Under a contract between a city and a water company, by which the latter agrees to supply the city with water sufficient for fire purposes, an individual citizen whose property has been destroyed by fire, through the alleged neglect of the water company in complying with the terms of the contract, has no right of action against the company as there is no privity of contract between them."⁵ In a Michigan case it is said that an employer ought not to be held responsible on the ground that the injury was the natural and probable result of his contract, where the contract itself expressly provides that the stipulated work shall be carefully done, and the injury complained of would not have occurred had that provision been observed.⁶

Sec. 161. Same, Effect of Statute.

In California it is held that a statutory provision requiring a municipality to let contracts regarding its streets, etc., to the lowest bidder is such compulsion as to absolve

⁴ *ANDERSON V. FLEMING* (1903), 160 Ind. 597; 67 N. E. 443; 66 L. R. A. 119; 16 Am. Neg. R. 606, n. If in a case wherein a railroad company has been compelled to pay a property owner for materials appropriated by its independent contractor, the contractor has agreed with the company to furnish the materials at his own expense, the company

may have an action over against him for what it has thus been compelled to pay for them. *Thomps. Neg.*, p. 615, note 132.

⁵ Note to *EARL V. LUBBOCK* (1905), 1 K. B. 253, in 1 *Amer. & Eng. Ann. Cas.* 755.

⁶ *SAMUELSON V. CLEVELAND, ETC., Co.* (1832), 49 Mich. 164; 13 N. W. 499; 43 *Amer. Rep.* 465.

tractor the employer, the county, was held liable.¹³ An independent contractor is liable, in exoneration of the employer, only for defects in the doing of the work and not for defects in the designing of such work.¹⁴ But it is said that the owner can not be held liable for personal injuries resulting from the failure of an independent contractor to conform to the plans and specifications because the owner failed to employ an architect to supervise the work of the contractor as contemplated by the contract.¹⁵

Sec. 164. Selecting Contractor, Generally.

It has been held that an employer is liable, not only where he knowingly employs an incompetent person to do public work but also in failing to exercise due and reasonable care to select such as are skillful and competent.¹⁶ "The master may be responsible for the negligent conduct of an independent contractor if he has failed to use reasonable care in selecting him." The same authority says further: "It is quite evident that an employer may be guilty of negligence in intrusting the work to an unskillful or incompetent person and in such event he is liable for resulting injury."¹⁷

¹³ *Cloud Co. v. Vickers* (1900), 62 Kans. 25; 61 Pac. 391. Cf., *Tyler v. Tehama Co.* (1895), 109 Cal. 618; 42 Pac. 240, where a bridge abutment was so built as to divert water from the river on to lands of plaintiff.

¹⁴ *CHURCH, ETC., v. PATERSON, ETC., R.* (1902), 68 N. J. L. 399; 53 Atl. 449, in which the retaining wall on a railway failed to furnish adequate support to land abutting on the railway. See, also, *ATLANTA, ETC., R. v. KIMBERLEY* (1891), 87 Ga. 161; 13 S.

E. 277; 27 Amer. St. Rep. 231; 67 L. R. A. 701.

¹⁵ *Hawke v. Brown* (1898), 50 N. Y. Supp. 1032.

¹⁶ *Norwalk, etc., Co. v. Norwalk* (1893), 63 Conn. 495, 529; 28 Atl. 32; *Brannock v. Elmore* (1892), 114 Mo. 55; 21 S. W. 451.

¹⁷ *Barrows on Neg.*, 162, citing *Berg v. Parsons* (1896), 84 Hun, 60; 31 N. Y. Supp. 1091 (the author does not note reversal of this case); *Norwalk, etc., Co. v. Norwalk, supra*. "See, also," *Ardesco v. Gilson* (1870), 63 Penn.

out causing it, and the contractor had agreed to do it, the injury was done in violation of his contract." Judgment was rendered for defendant.¹⁰

Sec. 163. Contract for Defective Plans.

"The owner can not dictate that his building be constructed of improper materials or upon an unsafe plan, and escape liability for injuries occasioned thereby, because he made a contract with a third person to build it; nor can he, with knowledge of a weakness or defect threatening the strength of the building, set a man at work immediately under it, and shift all responsibility upon the builder."¹¹ Where the negligence, in erecting a wall abutting against a party wall which, by reason of insufficient support, fell on plaintiff's building, was not in the workmanship or materials used by contractors, but in the plans and specifications, the owners of the building are liable.¹² And where a defectively planned bridge fell on workmen while it was in the course of being constructed by an independent con-

¹⁰ *Aston v. Nolan* (1883), 63 Cal. 269.

¹¹ *MEIER v. MORGAN* (1892), 82 Wisc. 289; 52 N. W. 174; 33 Amer. St. Rep. 39, per Winslow, J.; *WHITNEY v. CLIFFORD* (1879), 46 Wisc. 138; 32 Amer. Rep. 703; *Trainor v. Philadelphia, etc., R.* (1890), 137 Penn. St. 148; 20 Atl. 632.

¹² *LANCASTER v. CONNECTICUT ETC., INSURANCE Co.* (1887), 92 Mo. 460; 5 S. W. 23; 1 Amer. St. Rep. 739. A person who contracted with another for the building of a house on his own land was held liable for the con-

sequences of the erection of a wall of insufficient strength where he reserved the right to alter or modify the plans and specifications, and to make any deviation in the construction, detail, or execution of the contract, without in either case invalidating the contract. *McMillen v. Walker* (1881), 21 N. B. 31. Cf., *Horner v. Nicholson* (1874), 56 Mo. 220. For other cases of liability where the work was done according to the employer's methods, see those cited in note to 65 L. R. A., pp. 755-757.

do one of these things, he should be held responsible for an injury resulting from his having undertaken the charge of the work; and that it is his duty to devolve the planning and execution of the work upon persons possessing sufficient knowledge and skill to accomplish what is contemplated without endangering the workmen and the public.¹⁹

In Minnesota it has been distinctly held that an employer can be held liable because he engaged an independent contractor, only in those cases where the work itself is intrinsically dangerous.²⁰ The doctrine of independent contractor makes it the duty of the proprietor to exercise reasonable care in the selection of the contractor engaged to perform services for him and where this care has been exercised he will not be liable for negligence of the contractor, that he, the proprietor, could not have anticipated by ordinary care.²¹ Thus, one who has employed a competent architect to erect a dam is not responsible for injuries caused by its bursting while the work is in progress.²²

There are some cases squarely denying the doctrine of one's liability for the negligence of an independent contractor even though the employer did not use reasonable care in selecting one competent to perform the work contracted for.²³ It is urged that the exception to the general

¹⁹ *Burke v. Ireland* (1901), 166 N. Y. 305; 59 N. E. 914.

²⁰ *Schipp v. Pabst Brewing Co.* (1896), 64 Minn. 22; 66 N. W. 3, the court refusing to follow the *dicta* in *Deford v. State* (1863), 30 Md. 204, and *Lawrence v. Shipman* (1873), 39 Conn. 589.

²¹ *White v. Green* (1904, Tex.), 82 S. W. 329.

²² *Boswell v. Laird* (1857), 8 Cal. 469; 68 Amer. Dec. 345. "Where a contractor takes entire control of a work, the employer having no right of supervision or

interference, the employer, if he is not negligent in his selection, is not liable to third parties for his contractor's want of care in the performance of it." *LANCASTER AVE., ETC., CO. v. RHOADS* (1887), 116 Penn. 377; 9 Atl. 852; 2 Amer. St. Rep. 608. As to effect of employing incompetent contractor, see, further, *Schnurr v. Huntington County* (1899), 22 Ind. App. 188; 53 N. E. 425.

²³ *Berg v. Parsons* (1898), 156 N. Y. 109; 50 N. E. 957; 41 L. R. A. 391; 66 Amer. St. Rep. 542;

In a leading case it is said: "Although the relation of master and servant does not exist between a hospital and the physicians and surgeons engaged by it, the hospital impliedly undertakes to exercise reasonable care in selecting persons who are skillful and trustworthy in their profession; and if a patient receives injury through its neglect to exercise such care, such patient is entitled to recover of the hospital, unless it enjoys some extraordinary exemption from liability."¹⁸ It has been strongly intimated in a recent New York case that, if a person is not competent to plan or carry out a piece of work, and yet attempts to

St. 146; *STURGES v. SOCIETY* (1881), 130 Mass. 414; 39 Amer. Rep. 463; *Brannock v. Elmore*, *supra*; *CUFF v. RAILROAD CO.* (1870), 35 N. J. L. 17; 10 Amer. Rep. 201; 16 Am. Neg. Cas. 668, n.; *Connors v. Hennessey* (1873), 112 Mass. 96. "There are occasional dicta to the effect that if one did not use reasonable care to select a competent contractor he may be liable for such contractor's negligence (*Lawrence v. Shipman*, 1893, 39 Conn. 586); and perhaps one or two cases involving to some extent an affirmation of the doctrine." Huff. Agcy., Sec. 219. It is sometimes stated that a person may be liable for the negligence of an independent contractor if he did not use reasonable care to select one competent to perform the work contracted for. Huff. Agcy., 2d ed., Sec. 219, citing *Berg v. Parsons* (1896), 90 Hun (N. Y.), 267, overruled (1898), in 156 N. Y. 109; 50 N. E. 957; 41 L. R. A. 391; 66 Amer. St. Rep. 542; 4

Am. Neg. R. 432, three judges dissenting; *NORWALK, ETC., CO. v. NORWALK* (1893), 63 Conn. 495, 528; 28 Atl. 321; *Brannock v. Elmore* (1892), 114 Mo. 55; 21 S. W. 451; *SEBECK v. PLATT-DEUTSCHE, ETC., VEREIN* (1900), 64 N. J. L. 624; 46 Atl. 631; 50 L. R. A. 199; 81 Amer. St. Rep. 512.

¹⁸ *GLAVIN v. RHODE ISLAND HOSPITAL* (1879), 12 R. I. 411, 424; 34 Amer. Rep. 675. See, generally, Sec. 149, *ante*. In the opinion of one learned writer, the decisions "furnish a sufficient body of authorities to warrant the conclusion that an employer may be held liable on the ground of negligence in selecting a contractor who does not possess that measure of skill and experience which the stipulated work demands. That no objection can be made on the score of principle to such a doctrine seems to be indisputable." C. B. Labatt, in note to *LOUISVILLE, ETC., R. v. LOW* (1901, Ky.), in 66 L. R. A. 944, citing and discussing many cases.

general rule, admissible as tending to show the employer's freedom from negligence, but it will not *per se* exonerate the employer.²⁷ If a railroad company exercises reasonable diligence in the selection of surgeons, nurses, etc., who are of good repute in their profession, it is not answerable on the footing of negligence for the result of the treatment which the professional persons so employed by them may bestow on the employee.²⁸

Where plaintiff sued a landowner for injuries resulting from blasting done by an independent contractor it was held, that in order to recover, the plaintiff should have shown, *inter alia*, that the independent contractor was a negligent and careless man, within the knowledge or means

a private charitable institution which has exercised due care in the selection of its employees can not be held liable for injuries resulting from their negligence." Note to PARKS v. NORTHWESTERN UNIVERSITY (1905, Ills.), in 4 Amer. & Eng. Ann. Cas., p. 104, citing numerous cases.

²⁷ TOLEDO, ETC., R. v. BEGGS (1877), 85 Ills. 80; 28 Amer. Rep. 613; Illinois, etc., R. v. Phillips (1868), 49 Ills. 234. Compare, LOSEE v. BUCHANAN (1873), 51 N. Y. 476; 10 Amer. Rep. 623; Chase's Cas. Torts, Supp. 15; Columbus, etc., R. v. Arnold (1869), 31 Ind. 177. "If all the other facts alleged in McPadden's second defense were found to be true it would manifestly be immaterial to the sufficiency thereof whether the jury were satisfied that McPadden used due and proper care in selecting H., whom they find to have been, in fact, a competent person, to perform the

work he undertook to perform as an independent contractor." WILMOT v. MCPADDEN (1906), 79 Conn. 367; 65 Atl. 157; 19 L. R. A. (N. S.), 1101, citing cases.

²⁸ PITTSBURGH, ETC., R. v. SUL-LIVAN (1895), 141 Ind. 83; 40 N. E. 138; 50 Amer. St. Rep. 313; 27 L. R. A. 840; QUINN v. RAILROAD (1895), 94 Tenn. 713; 45 Amer. St. Rep. 767; 30 S. W. 1036; 28 L. R. A. 552. A steamship company engaging a reasonably competent and skillful surgeon, although upon the payment of a salary, to attend upon its passengers during its voyages, whether in pursuance of a statute or not, and providing such surgeon with reasonable medical stores and surgical appliances, is not answerable for such surgeon's malpractice. LAUBHEIM v. ROYAL, ETC., STEAMSHIP CO. (1887), 107 N. Y. 228; 13 N. E. 781; 1 Amer. St. Rep. 815.

rule, if once admitted, would run counter to business customs under which a contractor may estimate and contract for work and afterwards sublet it to others who are specialists, would go far toward destroying the whole doctrine applicable to independent contractors and would "open a new and unlimited field for actions for negligence."²⁴

Sec. 165. Same, Degree of Care.

"Difficulty arises, however, in determining what degree of care in the selection is sufficient to exonerate the employer from the charge of negligence and the cases afford no satisfactory rule. It would seem that each case must be decided upon its own circumstances, the character of the work, and the corresponding degree of skill required in its accomplishment, the probable attendant dangers, and the general reputation of the contractor for skill and efficiency."²⁵ It is said by another author that the only duty resting upon one who supplies a physician, if the latter is, in the given case, an independent contractor, is to use *proper* care in selecting him.²⁶ The competency of the contractor is, as a

4 Am. Neg. R. 432; 47 Cent. L. J. 237; *Schipp v. Pabst Brewing Co.* (1896), 64 Minn. 22; 66 N. W. 3.

²⁴ Huff. Agcy., 2d ed., Sec. 219, citing *Berg v. Parsons*, *supra*, and *Schipp v. Pabst Brewing Co.*, *supra*. It is urged, on the other hand, that the exception imposes on one having work performed only a duty which he fairly owes to the public or to adjoining owners; dissenting opinion in *BERG v. PARSONS*, *supra*. Regarding the contention of plaintiff that there was, in the case before the court, a constructive *culpa* in

employing careless persons, Lord Mackenzie said: "It is perfectly vain to say that any such blame can attach to a man who employs responsible tradesmen to execute harmless repairs on his house (in this case plastering), or in those persons contracting with another to do part of the work." *M'Lean v. Russell* (1850), 12 Sc. Sess. Cas., 2d series, 887.

²⁵ Barrows on Neg., p. 162. The author refers to the section on "Negligence of Master in Selecting Competent Co-employees."

²⁶ Burdick on Torts, p. 135. "The principle is well settled that

be negligent.³¹ One case has expressly approved the doctrine that an employer is liable for the torts of a contractor whom he employs knowing him to be unfit or incompetent for the work or knowing that his manner of doing the work is negligent.³² But the fact that a building contractor was negligent in respect of the work does not create a presumption that the owners of the property were guilty of negligence in having employed him so as to render them liable to a third person for an injury caused by his negligence.³³ One case apparently expressly rejects the doctrine that an employer of an incompetent independent contractor is liable for the latter's torts, if he knew his unfitness, incompetency or habitual negligence.³⁴

Sec. 167. Identity of Employer and Contractor.

The obvious principle that the proprietor will continue liable for his own negligence in any event covers the case where there is a substantial identity between the contractor and his employer, *e. g.*, where the work of a corporation

³¹ Burd. Torts, p. 144, citing *Dillon v. Hunt* (1884), 82 Mo. 155; *Brannock v. Elmore* (1892), 114 Mo. 55; 21 S. W. 451, and cases cited therein, in which case it was held that the employer is liable if he contracts with one to do blasting whom he knows to be in the habit of blasting in violation of an ordinance.

³² *Norwalk Gaslight Co. v. Norwalk* (1893), 63 Conn. 495; 28 Atl. 32, cited in Burd. Torts, p. 144.

³³ *Hawke v. Brown* (1898), 28 App. Div. (N. Y.), 37; 50 N. Y. Supp. 1032.

³⁴ *BERG v. PARSONS* (1898), 156 N. Y. 109; 50 N. E. 957; 41 L.

R. A. 391; 66 Amer. St. Rep. 542; 47 Cent. Law J. 237; Burd. Cas. Torts, 406, n.; 4 Amer. Neg. R. 432, reversing (1895), 84 Hun, 60; 51 N. Y. Supp. 1091, where it was expressly held that the employer is bound to select a suitable and competent contractor for blasting. In another New York case it was ruled in the trial court that evidence that the contractor was notoriously incompetent was inadmissible, without proof that the defendant's contracting agents *knew* of such incompetency. The case was reversed on appeal. *Kelly v. New York* (1854), 4 E. D. Smith, 291; 11 N. Y. 432.

of knowledge of the defendant.²⁹ In the lower court, in a leading New York case, it was stated that the employer's inquiry must be with reference to the contractor's ability to perform the service for which he is employed; hence, one employing a contractor to do blasting for a cellar was held not to have performed this duty by making inquiry of a law clerk who claimed to have seen a piece of blasting done by the contractor and said it was reasonably well done, but did not inquire as to his ability to do this particular kind of blasting.³⁰

Sec. 166. Same, Incompetency Known.

There are many *dicta* to the effect that the employer is under a legal duty to exercise due care in selecting a contractor and that he will be answerable for the contractor's torts if the latter is known to him to be unfit or incompetent for the proper execution of the work in hand or if his manner of doing the work is known to the employer to

²⁹ Hunt v. McNamee (1905), 72 C. C. A. 441; 141 Fed. 293. In a New York case it was held that the plaintiff was improperly non-suited, since the defendant had not exonerated himself from liability, by showing that he employed a skilled and competent architect, and that he could rightfully rely upon him both for the preparation of plans and the superintendence and inspection of the work and that he did not interfere with the architect in the discharge of the duties the latter assumed to perform for the owner. The architect could not be said to be skilled in the busi-

ness, because the defendant considered him such or the architect represented himself to be such, as by signing the plans. Nor was it enough for the defendant to say that he relied upon the approval of the plans by the building department, as a certificate of capacity or competency of the architect he employed. Fox v. Ireland (1900), 46 App. Div. 541; 61 N. Y. Supp. 1061.

³⁰ BERG v. PARSONS (1896), 84 Hun (N. Y.), 60; 31 N. Y. Supp. 1091; reversed on other grounds (1898), 156 N. Y. 109; 50 N. E. 957; 41 L. R. A. 391; 66 Amer. St. Rep. 542; 4 Am. Neg. R. 432.

work of the contractor and directs a particular thing to be done, from which injury results, obviously he will be liable, for it is his own personal act.³⁷ "If an owner modifies, in any respect, his contract with those contracting to erect a building, so that in doing any particular act they are obeying the directions of the owner, if that act is negligent and damage ensues, the owner is liable. In such a case it is his duty to see that what is done under his special orders is not negligently done."³⁸

Sec. 169. Same, What Amounts to Interference.

Even if the *contract* did so show (*i. e.*, that the employee was an independent contractor) still if the *proof* in the case showed, as a matter of fact, that the appellant was controlling in whole or in part the work and blasting which

Amer. Rep. 37; *Eaton v. Railroad Co.* (1871), 59 Me. 520, 532; 8 Amer. Rep. 430; *CLARK v. FRY* (1858), 8 Ohio St. 358; 72 Amer. Dec. 590; *Robinson v. Webb* (1875), 11 Bush (Ky.), 464; *Hughes v. Railway Co.* (1883), 39 Ohio St., 461; 15 Am. & Eng. R. Cas. 100. See, also, *Chicago, etc., Co. v. Myers* (1897), 168 Ills. 139; 48 N. E. 66. But see, *Weber v. Railroad Co.*, *supra*; *Burke v. Ireland* (1901), 26 App. Div. 487; 50 N. Y. Supp. 369; *Bohrer v. Harness Co.* (1898), 19 Ind. App. 489; 45 N. E. 668; 49 N. E. 296. See *ante*, Secs. 18, 19, 52, 65.

³⁷ *Jones v. Chantry* (1874), 4 N. Y. Super. Ct., T. & C. 63; *DAVIE v. LEVY* (1887), 39 La. Ann. 551; 2 So. 395; 4 Amer. St. Rep. 225; *Reynolds v. Braith-*

waite (1889), 131 Penn. St. 416; 18 Atl. 110; *MEIER v. MORGAN* (1892), 82 Wisc. 289; 52 N. W. 174; 33 Amer. St. Rep. 39.

³⁸ *Bosworth, J.*, in *Heffernan v. Benhard* (1863), 1 Robt. (N. Y.), 436. If the employer, having reserved no right to interfere, does in fact interfere, and the injury complained of is the natural result of such interference, the employer is liable. Huff. Agcy., 2d ed., Sec. 226, citing *Lawrence v. Shipman* (1873), 39 Conn. 586, 590; *BERG v. PARSONS* (1898), 156 N. Y. 109; 50 N. E. 957; 41 L. R. A. 391; 66 Amer. St. 542; 47 Cent. Law J. 237; *Burd. Cas. Torts*, 406, n.; *ATLANTA, ETC., RAILROAD v. KIMBERLEY* (1893), 87 Ga. 161, 168; 13 S. E. 277; 27 Amer. St. Rep. 231.

is performed by an operating company, whose personnel is substantially identical with that of the corporation itself.³⁵

Sec. 168. Employer Wrongfully Interfering.

The proprietor may make himself liable by interfering with the contractor and assuming control of the work, or some part of it, so that the relation of master and servant arises, or so that an injury ensues which is traceable to his interference.³⁶ Thus, if the proprietor interferes with the

³⁵ *Jas. McNeil, etc., Co. v. Crucible, etc., Co.* (1904), 207 Penn. St. 493; 56 Atl. 1067. See *ante*, Secs. 30, 76, 124.

³⁶ *Gilbert v. Beach* (1855), 16 N. Y. 423; *Hefferman v. Benhard* (1863), 1 Robt. (N. Y.), 432; *Jones v. Chantry* (1874), 4 N. Y. Sup. Ct., T. & C. 63; *Butts v. Mackey Co.* (1893), 72 Hun, 562; 25 N. Y. Supp. 531; (1895), 147 N. Y. 715; 42 N. E. 722; *Nevins v. Peoria* (1866), 41 Ills. 502; 89 Am. Dec. 392; *COOPER v. SEATTLE* (1897), 16 Wash. 462; 47 Pac. 887; 58 Amer. St. Rep. 46; *Harding v. Boston* (1895), 163 Mass. 14; 39 N. E. 411; *LARSON v. METROPOLITAN STREET R.* (1892), 110 Mass. 234; 16 L. R. A. 330; 33 Amer. St. Rep. 439; *NORWALK GAS CO. v. NORWALK* (1893), 63 Conn. 495; 28 Atl. 321; *Crenshaw v. Ullman* (1893), 113 Mo. 633; 20 So. 1077; *BIBB v. NORFOLK, ETC., R.* (1891), 67 Va. 711; 14 S. E. 167; 47 Amer. & Eng. R. Cas. 651; *Welsh v. Parrish* (1892), 148 Penn. St. 599; 24 Atl. 86; *Casement v. Brown* (1893), 148 U. S. 615; 37 Law Ed. 582; *SMITH v. MILWAUKEE, ETC., EXCHANGE* (1895), 91 Wisc. 360; 64 N. W. 1041; 30 L. R. A. 504; 51 Amer. St. Rep. 912; *Weber v. Buffalo, etc., R.* (1897), 20 App. Div. 292; 47 N. Y. Supp. 7; *Kelly v. New York* (1854), 11 N. Y. 432; *Fitzpatrick v. Chicago, etc., R.* (1888), 31 Ills. App. 649; *Burmeister v. New York, etc., R.* (1881), 47 N. Y. Super. Ct. 264. *Contra*, *Harper v. Mikwaukee* (1872), 30 Wisc. 365. Cf., *BLAKE v. FERRIS* (1851), 5 N. Y. 48; 55 Amer. Dec. 304. If the employer interferes with the performance of the work or assumes to assist therein, he may thereby incur liability. *Burgess v. Gray* (1845), 1 Man. G. & S. 578; *Fisher v. Rankin* (1894), 78 Hun, 407; 29 N. Y. Supp. 143; *Norwalk Gaslight Co. v. Norwalk* (1893), 63 Conn. 495; 28 Atl. 32; *WOODMAN v. METROPOLITAN, ETC., R.* (1889), 149 Mass. 335; 21 N. E. 482; 4 L. R. A. 213; 14 Amer. St. Rep. 427; 6 Rail. & Corp. Law J. 72; 12 Am. Neg. Cas. 80; *KING v. RAILROAD CO.* (1876), 66 N. Y. 181; 23

view of the usual building contract. The contractor stipulates to deliver to the proprietor certain *results*. He is responsible to the proprietor for these only. The proprietor does not retain control over the contractor as to his methods of proceeding with the work. He could not do so; for the contractor is generally skilled in the business, and he is not. No contractor could safely stipulate to do a job at a fixed price and then allow the proprietor to control him in matters of method and detail, for this might destroy his power so to order the work as to make his contract a profitable one. The proprietor usually retains control by a skilled architect, not for the purpose of controlling the contractor in his methods, but for the purpose of assuring himself that the results enumerated in the specifications of the contract are reached by the contractor step by step, as the work progresses. There is no sound view under which such a contract can be construed as creating the relation of master and servant between the proprietor and contractor, and the conclusion of the Illinois court can not be upheld and the great weight of authority is to the contrary.”⁴⁴ Where the employer is exercising, over the premises on which the stipulated work is done, a right of control which is co-ordinate and concurrent with that vested in the contractor, the owner may be liable, for under such circumstances the nature and extent of the employer’s responsibility is determined by the principle that a person “must not suffer a nuisance to continue on his premises to the injury of others, although he is not responsible for its creation.”⁴⁵

⁴⁴ “This question is well gone over in *Robinson v. Webb* (1875), 11 Bush (Ky.), 464, with a result the reverse of that in *Schwartz v. Gilmore*, *supra*. To the same effect are” many cases cited. *Thomps. Neg.*, Sec. 662, n. 63.

⁴⁵ *VOGEL v. NEW YORK* (1883), 92 N. Y. 19; 44 Amer. Rep. 349. In one case (reserving control) the employer is still the master and liable as such for the negligence of his servants; in the other case (interference) he is

resulted in the injuries complained of, it would be responsible therefor if the negligence was such as to render it in any manner responsible.³⁹ The mere fact that the agent of a proprietor, when asked by an employee of the contractor what he should do, told him to go to a certain portion of the premises and engage in a certain line of work, and the employee was injured in such work, has been held not to show a masterful direction by the proprietor to the employee to work at a place which the proprietor was legally bound to provide as safe.⁴⁰ A mere request by the proprietor that the contractor hasten the work will not be regarded as an interference with the work under the rule.⁴¹

Sec. 170. Employer Reserving Control.

In a leading work,⁴² it is said: "One court has gone so far as to hold that where a proprietor contracts for the erection of a building and by the terms of the contract retains control by an architect, under whose direction the contractor agrees to do the work, and also retains the power to change the plan of the work, he will be answerable for the negligence of the contractor."⁴³ This, however, is not the sound

³⁹ *LOUISVILLE, ETC., RAILROAD v. Low* (1901), 23 Ky. L. R. 408; 63 S. W. 27; 66 L. R. A. 941; 21 Am. & Eng. R. Cas. (N. S.), 441, in which the question was held properly submitted to the jury.

⁴⁰ *Glaser v. Michelson* (1904), 86 N. Y. Supp. 286. Under the New York statute, which imposes the duty of furnishing or erecting safe and suitable scaffoldings upon a person directing another to perform labor in altering a building, it was held that a proprietor employing an independent contractor to instal machin-

ery and furnishing workmen to assist was not made liable for injuries caused by an insufficient scaffold by the mere fact that one of his foreman in the course of the work directed the workmen of the independent contractor to erect the scaffold. *Wingert v. Krakauer* (1904), 87 N. Y. Supp. 261.

⁴¹ *Eldred v. Mackle* (1901), 178 Mass. 1; 59 N. E. 673.

⁴² *Thompson on Neg.*, Sec. 662.

⁴³ *Citing Schwartz v. Gilmore* (1867), 45 Ills. 455; 92 Am. Dec. 227.

contractor and his subcontractor have joint supervision over the work, and co-operation between them is necessary to its completion. Under these circumstances, they are jointly liable to persons injured by reason of their negligence.⁴⁸ It has been held that the fact that, under the contract, the work is to be done under the supervision of the railroad company's chief engineer does not take the case out of the rule of exemption, since this supervision is reserved merely for the purpose of securing direct *results* and not for the purpose of controlling the contractor in his methods of procedure.⁴⁹

Sec. 172. Same, Permitting Use of Defective Appliances.

It has been said in several Kentucky cases that the employer of an independent contractor consenting to the use of a defective appliance belonging to him by the servants of the contractor is not liable for injuries caused thereby where he is under no obligation to furnish the appliance.⁵⁰

Sec. 173. Employer Accepting Work.

If the proprietor employs a contractor to do work, not in its nature a nuisance, but which when completed is so by reason of the manner in which the contractor has done it and he *accepts* the work in this condition, he becomes at once responsible for the existence of the nuisance, upon a principle very similar to that which makes a principal responsible for the unauthorized wrongs committed by his

⁴⁸ BAUMEISTER v. MARKHAM (1897), 101 Ky. 122; 39 S. W. 844; 41 S. W. 816; 2 Amer. Neg. Rep. 363; 72 Amer. St. Rep. 397.

⁴⁹ McKinley v. Chicago, etc., R. (1890), 40 Mo. App. 449, which decision Judge Thompson declares

untenable. Thoms. Neg., 672, n. 133.

⁵⁰ Bush v. Grant (1901), 22 Ky. L. R. 1766; 61 S. W. 363; CENTRAL, ETC., CO. v. GRIDER (1903), 115 Ky. 745; 74 S. W. 1053; 65 L. R. A. 455; 16 Am. Neg. R. 610, n.

Sec. 171. Same, Partly Doing Work.

The proprietor himself may become liable for an injury happening through his personal negligence in performing some particular part of the work. If he performs some part of the work and another part is let out to a contractor, then the rule applies that, when several persons are engaged in the same work, in which the negligence or unskillful performance of his part by one causes danger to others, in which each must necessarily depend for his safety upon the good faith, skill and prudence of each other in doing his part of the work, it is the duty of each, to the others engaged in the work, to exercise the care and skill ordinarily employed by prudent men under similar circumstances.⁴⁶ The owner of premises who assumes control of building stones as they are delivered, or directs the contractor where to put them, may be held responsible for negligence in having them placed in an exposed position in the street where they are liable to fall or be thrown down and injure passersby, although the contractor alone would have been responsible except for his interference.⁴⁷ The rule exempting contractors from liability for the negligence of a subcontractor or of his servant, is without application where the original

himself the actor and liable for the natural and probable results of his own acts. Huff. Agcy., 2d ed. Sec. 226.

⁴⁶ *Griffiths v. Wolfram* (1875), 22 Minn. 185; 16 Am. Neg. Cas. 219, n.

⁴⁷ *Mahar v. Steur* (1898), 170 Mass. 454; 49 N. E. 741. As in other cases, the negligence may consist in the direct intervention or acts, or omissions of the railroad company itself, or of its own servants. Thus, it has been

held that where a contractor lays a railroad track under an agreement that those in charge of the construction train shall be employed and paid by the company and not by himself, and that he shall have no control of the train, in any manner, the company is liable for injuries to a person employed by him resulting from negligence of those in charge of the train. *Chicago, etc., R. v. Clark* (1889), 26 Nebr. 645; 42 N. W. 703.

dition of the subject-matter is to be determined from the circumstances in evidence; thus, where the general contractor, for the construction of a building, has sublet the work of building the walls, the fact that he used the walls for the purpose of doing the wood-work upon the building and paid the subcontractor for the material furnished and for work done by him, is strong evidence to show that he accepted the walls as a performance of the subcontract and that the character of both work and materials was satisfactory to and sanctioned by him.⁵⁴ Acts from which the assumption of a practical control over the subject matter of the contract, in its completed state is inferable, will render the employer chargeable with the same measure of responsibility as a formal acceptance of the results; and on this ground one who had filled and used a stand-pipe for supplying water to his customers was held liable for the flooding of the premises of an adjoining owner on the collapse of the stand-pipe, although the contractor was, at the time, trying to remedy a defect therein so as to make it acceptable to the employer.⁵⁵

⁵⁴ *Bast v. Leonard* (1870), 15 Minn. 304. Where a laborer was injured by the derailment of a construction train resulting from defects in the track and in rolling stock, the railroad company was held not liable. The decision turned largely on the question whether the particular section of the road on which the accident occurred had been turned over to the company so as to bring the construction train under its control. *St. Louis, etc., R. v. Willis* (1888), 38 Kans. 330; 16 Pac. 728; 33 Am. & Eng. R. Cas. 397.

⁵⁵ *READ v. EAST PROVIDENCE ETC., DISTRICT* (1898), 20 R. I.

574; 40 Atl. 760; 4 Amer. Neg. Rep. 589. When the acceptance and use of a building will constitute the acceptance of the work in its construction or repair is a question frequently arising. Authorities on it are considered in a note to the recent Maryland case of *Pope v. King* (1903, Md.), 69 Atl. 417; 16 L. R. A. (N. S.), 489, in which case a contract for repairs provided that payments should be made on a certificate from the architect, and it was held that use of the building did not make the owner liable to make the payments except when the stipulated certificate was pre-

agent, by ratifying them.⁵¹ In Pennsylvania it is held that if the employer, at the time he resumes possession of the work, from an independent contractor, knew or ought to have known, or from a careful examination could have known, that there was any defect in the work, he is responsible for any injury caused to a third person by defective construction.⁵² If independent contractors make a defective railroad crossing over a public highway and the railroad company accepts the work, and in consequence of the defect a third person is killed, the railroad company must pay damages.⁵³

Sec. 174. Same, What is Acceptance.

Whether the work has been accepted in such sense as to render the employer responsible thenceforward for the con-

⁵¹ *BOSWELL v. LAIRD* (1857), 8 Cal. 49, per Field, J., 68 Amer. Dec. 345; *Beberich v. Ebach* (1890), 131 Penn. St. 165; 18 Atl. 1008; *Khron v. Brock* (1887), 144 Mass. 516; 11 N. E. 748.

⁵² *FIRST PRESBYTERIAN CONGREGATION v. SMITH* (1894), 163 Penn. St. 561; 30 Atl. 279; 43 Amer. St. Rep. 808; 26 L. R. A. 504; 39 Cent. Law J. 452. Cf., *Beberich v. Ebach*, *supra*, in which it was stated that if the general contractor for the erection of a building *accepts* a portion of the work from subcontractor, with a knowledge of its condition, and the work thus accepted is so defective that it afterwards causes the building, while still in course of erection, to fall upon an adjoining property, the general contractor will

be liable for the damages, since an original proprietor would be liable under like circumstances. After the contractor has completed the work and turned it over to the proprietor, and the proprietor has accepted it in discharge of the contract, then, if by reason of the negligent manner in which the work has been done, a third person suffers injury, the liability, if any, will rest upon the proprietor and not upon the contractor. *CURTIN v. SOMERSET* (1891), 140 Penn. St. 70; 21 Atl. 244; 12 L. R. A. 322; 23 Amer. St. Rep. 220; *Fitzmaurice v. Fabian* (1892), 147 Penn. St. 199; 23 Atl. 444.

⁵³ *Taylor, etc., R. v. Warner* (1895), 88 Tex. 642; 31 S. W. 66; 32 S. W. 868.

been transferred to the employer, as a result either of the completion or stoppage of the work, he incurs the responsibilities which the law attaches to the exercise of the control; and the mere fact that the dangerous conditions which caused the injury were originally created by the negligence or other tortious act of a contractor will not afford him any protection if he permits them to continue after it is in his power to remedy them.⁵⁸ Upon this ground the employer is held liable in the two following classes of cases: (1) Where the dangerous conditions resulted from the execution of a contract which was essentially one for the construction or formation of a thing which had previously no existence;⁵⁹ (2) Where the dangerous condition arose from the performance of a contract which provided for repairing, or otherwise altering, a thing which had previously existed and had constituted a part of the employer's property."⁶⁰

⁵⁸ Citing *VOGEL v. NEW YORK* (1883), 92 N. Y. 10; 44 Amer. Rep. 349.

⁵⁹ Citing cases under (a) *post*, note 60.

⁶⁰ Note to *CHOCTAW, ETC., R. v. WILKER* (1906), 16 Okla. 384; 84 Pac. 1086; 46 Am. & Eng. R. Cas. 759, in 1 L. R. A. (N. S.), 596, citing (a) *Cleghorn v. Taylor* (1856), 18 Sc. Sess. C., 2d series, 664; *McIntyre v. Gallach* (1883), 11 Sc. Sess. C., 4th series, 64; *Philadelphia, etc., R. v. Philadelphia, etc., Co.* (1859), 23 How. (U. S.), 209; *GORHAM v. GROSS* (1878), 125 Mass. 232; 28 Amer. Rep. 234; *Mulchey v. Methodist, etc., Society* (1878), 125 Mass. 487; 15 Am. Neg. Cas. 661, n.; *Khron v. Brock* (1887), 144 Mass. 516; 11 N. E. 748; *CORK v. BLOSSOM* (1894), 162 Mass. 330; 38

N. E. 495; 26 L. R. A. 256; 44 Amer. St. Rep. 362; *STURGES v. THEOLOGICAL, ETC., SOCIETY* (1881), 130 Mass. 414; 39 Amer. Rep. 463; *McCamus v. Citizens, etc., Co.* (1863), 40 Barb. (N. Y.), 381; *Wilkinson v. Detroit, etc., Works* (1889), 73 Mich. 405; 41 N. W. 490; *Carey v. Courcelle* (1865), 17 La. Ann. 108, subcontractor's negligence; *Skelton v. Larkin* (1894), 82 Hun (N. Y.), 388; 31 N. Y. Supp. 234; (1895), 146 N. Y. 365; 41 N. E. 90; *Bohrer v. Dienhart, etc., Co.* (1898), 19 Ind. App. 489; 49 N. E. 296; *Moore v. Townsend* (1899), 76 Minn. 64; 78 N. W. 880; *BAILEY v. NEW YORK* (1842), 3 Hill (N. Y.), 532; 38 Amer. Dec. 669; and citing (b) *Tarry v. Ashton* (1876), L. R., 1 Q. B. D. 314; 7 Am. Neg. R. 157, n.;

Sec. 175. Same, Knowledge of Condition.

"In several cases in which the rule (holding the employer liable after acceptance) has been applied, it has been expressly declared or assumed by the courts that the imputation of liability is conditional upon the production of evidence which shows that the employer had either actual or constructive knowledge of the dangerous conditions which caused the injury."⁵⁶

Sec. 176. Same, Work Abandoned by Contractor.

If after an independent contractor to whom the construction or repair of its roadbed has been committed by a railroad company, abandons the contract to the company, the company completes the work, the company is clearly liable for such work.⁵⁷ To a note to a recent case it is said that "it is clear that the immunity" by a general rule "conceded is predicable only in respect to those cases in which the injury was received while the stipulated work was in progress. As soon as the control of the subject matter of the contract has

sented. To somewhat broader effect are many of the cases cited, showing that in general mere occupancy and use will not amount to an acceptance of the work of building or repairing the structure, nor amount to waiver of defects therein, although the circumstances may be sufficient in a particular case to show that the owner accepts the work.

⁵⁶ Note to *CHOCTAW, ETC., R. v. WILKER* (1906), 16 Okla. 384; 84 Pac. 1086; 46 Am. & Eng. R. Cas. 759, in 3 L. R. A. (N. S.), 601, citing *FIRST PRESBYTERIAN CONGREGATION v. SMITH* (1894), 163 Penn. St. 561; 30 Atl. 279; 26 L.

R. A. 504; 43 Amer. St. Rep. 808; 39 Cent. Law J. 452 (sewer); *Beberich v. Ebach* (1889), 131 Penn. St. 165; 13 Atl. 1003 (stone foundation); *Charters, etc., Co. v. Lynch* (1838), 118 Pa. 362; 12 Atl. 435; *BOSWELL v. LAIRD* (1857), 8 Cal. 469; 68 Amer. Dec. 345; *Fanjoy v. Seales* (1865), 29 Cal. 243; *Neuman v. Greenleaf, etc., Co.* (1898), 73 Mo. App. 326. *Contra*, as to notice to city of defect in highway, the charter providing for notice in some cases, see *Houston v. Isaacs* (1887), 68 Tex. 116; 3 S. W. 693.

⁵⁷ *Savannah, etc., R. v. Phillips* (1892), 90 Ga. 829; 17 S. E. 82.

CHAPTER VII.

EMPLOYER'S LIABILITY TO HIS OWN SERVANTS.

SECTION

- 180. General rule as to liability for independent contractor's act.
- 181. Whether person injured was servant or independent contractor.
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SECTION

- 191. Question for jury.
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- 198. Liability regarding subcontractors.

Sec. 180. General Rule as to Liability for Independent Contractor's Acts.

“It is apparent that the rule that a master is not negligent in omitting to test appliances if he purchases them from a reputable dealer or manufacturer, virtually creates an exception *pro tanto* to the operation of the doctrine of non-delegable duties; for although the rationale of the decisions is the absence of negligence, the rule virtually amounts to an assertion that a master may, to some extent, evade responsibility for the non-performance of one of these duties (supplying proper instrumentalities) by procuring them from an independent contractor. Singularly enough, this

Sec. 177. Contractor Generally Exempt.

The general rule is that after the contractor has turned the work over and it has been accepted by the proprietor the contractor incurs no further liability to third persons by reason of the condition of the work; but the responsibility, if any, for maintaining or using it in its defective condition, is shifted to the proprietor. The contractor remains liable, if at all, only to the proprietor for a breach of his contract.⁶¹

Silverton v. Marriott (1888), 59 L. T. (N. S.), 61; Beberich v. Ebach (1890), 131 Penn. 165; 18 Atl. 1008.

⁶¹ For note, see 26 L. R. A. 504. The general rule exempting con-

tractors after the work is completed, turned over and accepted, applies at least if such work is not *per se* imminently dangerous. Swan v. Jackson (1889), 55 Hun (N. Y.), 194; 7 N. Y. Supp. 821.

a master can not relieve himself of the duty of exercising ordinary care to provide reasonably safe appliances for his servants, by the employment of superintendents or independent contractors to provide such appliances.³ Contrary to what is probably the general rule, it has been held in a Virginia case that where it is the custom of railroad compa-

note. In a Federal case the master has been held, unqualifiedly, not relieved of a positive personal duty by letting the work to a contractor; the plaintiff having been injured by the fall of a heavy beam due to the negligence of the contractor's servants in leaving it loose while repairs were being made. *Toledo, etc., Co. v. Bosch* (1900), 41 C. C. A. 482; 101 Fed. 530. An employer has been held liable for defects in a scaffold which had been constructed by a contractor for the brick work on a building, and which gave way under a stone setter, and the general principle was laid down that it does not matter whether the instrumentality furnished to an employee was constructed by the master himself or was obtained by gift or through a right arising from an established custom. *McBeath v. Rawle* (1901), 93 Ills. App. 212. See, also, Sec. 99, *ante*.

³ *Herder v. Buck, etc., Co.* (1896), 136 Mo. 3; 37 S. W. 115; *Burnes v. Kansas City, etc., R.* (1895), 129 Mo. 41; 31 S. W. 347; *Bartley v. Trorlicht* (1892), 49 Mo. App. 214, citing *Northern, etc., R. v. Herbert* (1886), 116 U. S. 647; 29 Law Ed. 758; 6 Sup. Ct. 590. Cf., *Sackewitz v.*

American, etc., Co. (1899), 70 Mo. App. 144; *Leslie v. Rich Hill, etc., Co.* (1892), 110 Mo. 31; 19 S. W. 308, under statute. "For a general review of the cases bearing upon the question whether a master can, by employing a contractor to perform one or more of the duties which he owes to his servants, relieve himself from liability for their non-performance, the reader is referred to Secs. 558 and 559 of *Labatt on Master and Servant*. The decisions are conflicting, but the weight of authority would seem to be distinctly in favor of the doctrine that a master cannot escape his responsibility by such a delegation of his duties. This, it is submitted, is the only doctrine which is logically tenable, and which can be reconciled with general principles. Below are collected a few more cases which support that doctrine, but which were overlooked when the above mentioned work was being compiled." Note by Mr. Labatt to *ANDERSON V. FLEMING* (1903, Ind.), 66 L. R. A. 153, citing *inter alia*, *The Magdaline* (1898), 91 Fed. 798, shipmaster liable to servant injured by negligence of contractor engaged in repairing ship.

aspect of the rule does not seem to have thus far attracted the attention of the courts. As regards the cases in which the master's liability for the default of an independent contractor in discharging a non-delegable duty is in question, they are so conflicting as to render it impossible to formulate any definite doctrine on the subject."¹ The theory that a master is entitled, as a matter of law, to rely on the quality of appliances obtained from a reputable manufacturer should be rejected because such theory is essentially inconsistent with the doctrine of the master's own non-delegable duties, for as between master and servant, this doctrine should always be regarded as controlling whenever it comes in conflict with that which declares that the employer of an independent contractor is not liable for his negligence, the situation then being materially different from that presented when a stranger is the injured party, inasmuch as the former of those doctrines has no application to such cases, except where statutory duties are involved. Another reason for rejecting the theory stated, is that, according to the rule adopted by most of the authorities, the injured servant has ordinarily no right of action against the manufacturer and, if he can not recover from the master, he can not recover at all. Assuming the defect which caused the injury to have been discoverable by the exercise of proper care, some one ought, in fairness, to be held responsible for its exercise, and it is a mere mockery of justice to absolve the master simply on the ground that he was justified in trusting to the skill and diligence of a person who, if that skill and diligence were, as a matter of fact, not exercised, is not liable to the servant because there is no privity of contract between them.² In a number of Missouri cases it is asserted that

¹ Labatt on Master & S., p. 1630, from whose most excellent discussion this chapter is largely derived.

² Labatt, Master & S., pp. 327-8, citing CLEVELAND, ETC., R. v. BERRY (1899), 152 Ind. 607; 53 N. E. 415; 46 L. R. A. 38, and

constructing a water-pipe trench and a laborer, employed under the direction of the city's inspector and superintendent, was assigned to the excavation of a twelve-foot section of the trench, but he had no authority or discretion as to his work, he was not an independent contractor and the city was bound to exercise reasonable care to provide for his safety against the caving in of the banks while he was at work.⁷

Sec. 182. Negligence of Contractor.

Whether the employer is liable to his own servants for injury, growing out of the negligence of the contractor, is a much-mooted question. Perhaps no general rule can be laid down. A few examples and authorities are given in this and the succeeding sections. Thus, where a hogshhead thrown from a truck in charge of an independent contractor, injured the plaintiff who had been sent with the horse, the employer was held not liable.⁸ The position of the South Carolina Supreme Court is not clear, though apparently the master is not absolved from liability for the contractor's negligence.⁹

Sec. 183. Same, Supplying Appliances.

In New York the doctrine is established that an employer is not liable to a servant for the condition of a structure erected for the use of the servant by an independent contractor. "While recognizing the antagonism between this doctrine and that of the non-delegable quality of certain duties, the New York Court of Appeals contents itself with declaring the master's non-liability and gives no reason for

⁷ Fort Wayne v. Christie (1901), 156 Ind. 172; 59 N. E. 385.

⁸ Brophy v. Bartlett (1888), 1

Silv. Ct. App. (N. Y.), 575, reversing 37 Hun, 642.

⁹ Conlin v. Charleston (1868), 15 Rich. L. 201.

nies to have certain work, not essentially hazardous, done by independent contractors, and ordinary care is used in selecting such contractors, the railroad companies can not be held responsible for injuries resulting to its employees through the negligence of such independent contractors since the railroad company is not an insurer of the safety of its employees, but is bound only to exercise ordinary care for their safety.⁴

Sec. 181. Whether Person Injured was Servant or Independent Contractor.

The question whether the wrong-doing or injured person was an independent contractor or a servant has arisen in quite a few cases. Thus, a city which held title to, and right of, possession of a cemetery within its limits, which was under the control and management of trustees chosen by the citizens, and removable for cause by the city council, was held liable to an employee working under the order of a superintendent, who, with the employee, was appointed by the trustees, subject to the approval of the city council, for an injury caused by the negligence of the superintendent and trustees.⁵ Minor children and their father, who hires them to work in a mine under a contract that the children shall cut coal at a specified price, the father to furnish the tools, powder, etc., and the bank boss to have control of the work, are held employees of the mine operator and not independent contractors and the mine operator is liable under the Alabama Employer's Liability Act.⁶ Where a city was

⁴ *NORFOLK, ETC., R. v. STEVENS* (1899), 97 Va. 631; 34 S. E. 525; 46 L. R. A. 367, which decision has been criticised as being "contrary to sound principle and not worthy to be cited." *Thomps. Neg.*, Sec. 3737, note 49.

⁵ *Toledo v. Cone* (1884), 41 Ohio St. 149. See, generally, Secs. 31, 110, *ante*.

⁶ *Drennan v. Smith* (1896), 115 Ala. 396; 22 So. 442.

left remediless if they are injured by reason of some dangerous property of the appliance. . . . Such a conclusion is simply preposterous and disgraceful to any system of jurisprudence. (c) . . . Either the vendor should no longer be allowed to shelter himself . . . or it should be regarded as an implied term in the contract between the master and his servants that all appliances obtained from parties not in his service are free from all defects which can be prevented by the exercise of that degree of care and skill which is required of persons following the same line of business as the vendor. The latter . . . would seem to be the most desirable. . . . The master would still have his action over against the vendor." ¹¹

¹¹ Labatt, Master & S., Sec. 559, citing under (a) *HOLE v. SUTTINGBOURNE, ETC.*, R. (1861), 6 Hurd. & N. 488; *Tarry v. Ashton* (1876), L. R., 1 Q. B. D. 314; *CURTIS v. KILEY* (1891), 153 Mass. 123; 26 N. E. 421; *Burd. Cas. Torts*, 403; *Wilkinson v. Detroit, etc., Works* (1889), 73 Mich. 405; 41 N. W. 490; 1 Shearm. & Redf. Neg., Secs. 14, 176; under (b) note to 46 L. R. A. 38-45, 107-119; under (c) 16 L. Q. R. 189; 36 Can. L. J. 203. The Pennsylvania cases are in conflict regarding the employer's liability for the negligent construction of appliances, etc., by an independent contractor. The earlier cases exempt the employer, while the later cases say he is not relieved of liability simply by reason of his having delegated that duty to an independent contractor. Mr. Labatt says (p. 1634): "The more recent expressions of opin-

ion appear to embody the correct doctrine." *Ardesco, etc., Co. v. Gilson* (1870), 63 Pa. 146; *Painter v. Pittsburgh* (1863), 46 Pa. 213. *Contra*, *Trainor v. Philadelphia, etc., Co.* (1890), 137 Pa. 148; 20 Atl. 632; *Ortlip v. Philadelphia, etc., Co.* (1901), 198 Penn. St. 586; 48 Atl. 497. The rule that a master discharges his duty to a servant by furnishing an appliance made by a reputable manufacturer is held, in Massachusetts, applicable only where it appears that the appliance was made for the use to which it was put. *Slattery v. Walker, etc., Co.* (1901), 179 Mass. 307; 60 N. E. 782. Where the owner of a machine, not in its nature dangerous, turns it over to another's use, in apparent good order, he is not liable for injuries resulting at a later date to such other's employee, whether from undiscovered defects in such machine,

its opinion.”¹⁰ The same distinguished author states expressly that “he has no hesitation in saying that he considers the cases absolving the master from responsibility for the negligence of an independent contractor in this connection (*i. e.*, as to safe appliances furnished by such contractor) have been decided upon a false theory of the circumstances involved. It is a contradiction in terms to speak of an absolute duty as being susceptible of delegation. If it can be delegated in any particular instance, it ceases, *ex hypothesi*, to be absolute. That this is a necessary corollary of the theory that a duty is absolute has been fully recognized in many English and American cases, where the complainant was a stranger: (*a*) Why a different principle should be applied where the injury is received by a servant of the party subject to the duty is not apparent, and no court has yet furnished any reason for making such a distinction. On the other hand there is a consideration which points very strongly, if not conclusively, to the conclusion that the case of a servant is precisely the one in which the courts should be most unwilling to allow the interposition of a contractor to shield the master. . . . A manufacturer who supplies a chattel to another person, to be used in his business, is not bound to indemnify the servants of the vendee for injuries which they receive owing to defects in the chattel. (*b*) Manifestly the result of applying concurrently both this principle and also the principle that the master who purchases an appliance from a manufacturer is, as regards his servants, entitled to rely upon its being fit for the purposes contemplated, unless there is something to put him on inquiry as to its condition, is that those servants are usually

¹⁰ Labatt, Master & S., 1632-2, citing *DEVLIN v. SMITH* (1881), 25 Hun (N. Y.), —, affirmed (1882), 89 N. Y. 470; 42 Amer. Rep. 311. To the same effect:

Wittenberg v. Friederich (1896), 8 App. Div. 433; 40 N. Y. Supp. 895. But see, *Wannamaker v. Rochester* (1892), 17 N. Y. Supp. 321.

omissions defendant was not liable.”¹⁴ The only English decision directly in point seems to be one wherein Justice Denman, sitting alone, held that a servant could not recover where a staging, which gave way under him, had been put up by an independent, competent contractor.¹⁵

Sec. 185. Same, Supplying Elevators.

A New Jersey case holds that a servant injured by an elevator which was in the course of construction by an independent contractor on the master's premises could not recover; “but here there was no delegation of a duty in the proper sense of the phrase, and the circumstances were governed by the principle that the dangerous agencies were, for the time being, quite out of the control of the plaintiff's master.”¹⁶ On the other hand, a Missouri case holds that a building owner is not absolved from the exercise of ordinary or reasonable care by entrusting the care of an elevator in such building to an independent contractor through whose negligence an injury happened to the owner's servant.¹⁷

¹⁴ Citing *BLAKE v. FERRIS* (1851), 5 N. Y. 48; 55 Amer. Dec. 304.

¹⁵ *Kiddle v. Lovett* (1885), L. R., 16 Q. B. D. 605; 34 Wkly. R. 518. But see, *Wilson v. Merry* (1868), L. R. 1 H. L. 326; 19 L. T. (N. S.), 530; *Hardaker v. Idle District, etc.* (1896), 1 Q. B. 335; *Groves v. Wimborne* (1898), 2 Q. B. 402. In Scotland it is held that if the defect in an appliance (a scaffold) could have been discovered by the exercise of reasonable care, a master is answerable for injuries caused by

its unsafe condition, even though the master, himself unskilled, intrusted the furnishing of the appliance to an independent contractor. *MacDonald v. Wyllie* (1898), 1 Sc. Sess. Cas., 5th series, 339. And see, *Stephens v. Thurso Police Commissioners* (1876), 3 Sc. Sess. Cas., 4th series, 542.

¹⁶ *Conway v. Furst* (1895), 57 N. J. L. 645; 32 Atl. 330; there is also an attempt to classify this danger with the “assumed risks.”

¹⁷ *Bartley v. Trorlicht* (1893), 49 Mo. App. 214. See Sec. 38a.

Sec. 184. Same, Supplying Scaffolds.

In an action by a workman against his employer for injuries caused by the falling of a staging on which he had been sent to work by his employer, where it appeared that the staging was insecure because constructed of poor material and that it was built by those who afterwards became plaintiff's fellow-servants but not under defendant's direct supervision, although he superintended the work generally, the defendant was held liable.¹² In *DEVLIN v. SMITH* ¹³ the lower court says: "The employer can not escape the responsibility of exercising due care by delegating that duty to an agent but he can employ a competent and unexceptionable contractor to construct tools, machinery, etc., and such conduct would be the exercise of that care which the law requires. The employment of a contractor is not a delegation of the employer's duty. It is, when properly done, an exercise of the care and a fulfillment of the duty which the law exacts." On appeal, it was stated that the one constructing the scaffold was not defendant's agent or servant, "but an independent contractor for whose acts or

or from its misuse; and the case is the same, though the one to whom it is turned over is an independent contractor who uses it in executing a contract with the owner. *ROBIDEAUX v. HERBERT* (1907), 118 La. 1089; 43 So. 887; 12 L. R. A. (N. S.), 632 (head-note by court, condensed), citing under case note *GAGNON v. DANA* (1898), 69 N. H. 264; 39 Atl. 982; 41 L. R. A. 389; 76 Amer. St. Rep. 170; *Coughlin v. Gillison* (1898), 68 L. J. Q. B. (N. S.), 147; *Blakemore v. Bristol*, etc., R. (1858), 8 El. & Bl. 1035; *McCarthy v. Young* (1861), 6 Hurl. &

N. 329; cf., *Erskine v. Chino*, etc., Co. (1895), 71 Fed. 270.

¹² *Arkerson v. Denison* (1875), 117 Mass. 407. Where a staging was constructed as plaintiff's fellow-servant suggested to defendants to which the defendants assented, it was held to be their duty to furnish proper material, failing in which they were liable for injuries to plaintiff by a fall of the scaffold due to the defective material. *Dunleavy v. Sullivan* (1908, Mass.), 85 N. E. 866.

¹³ (1881), 25 Hun. 206; (1882), 89 N. Y. 470; 42 Amer. Rep. 311.

forms a part, owes no obligation to its employees running trains over such bridge, except to keep it in as good condition as when it was bought; and has a right, without negligence, to assume the sufficiency of its original plan and construction; and denied the application of the doctrine of *DEVLIN V. SMITH*²⁰ for two reasons: (1) Because the defendant here bought the bridge of another railroad Company and without any selection or choice of the builder, such as was made in the scaffold case, and (2) because the bridge, unlike the scaffold, was not a temporary but a permanent structure, intended for continuous use through the years. The court said: "Assuming, as we must, what the jury could have found from the evidence, . . . that the bridge, when purchased, was unsafe and dangerous by reason of defects in its original plan and construction, and which defects were obvious to the eye of a skilled inspector, and easily and surely ascertainable by a structural analysis determining its factor of safety—it was negligence on the part of the defendant to continue its use in the face of such obvious defects without ascertaining their effect upon its strength and capacity. The defects pointed out by the evidence were almost all obvious to the eye of a competent examiner. The learned counsel for appellant insists that the defendant did employ suitable and competent persons to inspect the bridge, who did make the usual and customary examinations, and that there is no dispute about that in the evidence. But it is plain that the inspection described in the proofs as customary is that made by a company which has built its own bridges. In such case it already knows the plans and mode of construction and is already responsible for the lack of reasonable care in either the design or its execution. The subsequent inspection is directed only to its perfect repair, and to indications of weakness. But where the company

²⁰ (1882), 89 N. Y. 470; 42 Amer. Rep. 311.

Sec. 186. Same, Supplying Derricks.

In a leading case in Rhode Island an independent contractor negligently so constructed a crane that the hauling chains were not properly insulated from the current of electricity which operated it; the employer was held responsible although the appliance became dangerous after being put into use.¹⁸ In a Texas case it is declared that a railroad company's duty to an employee to furnish safe appliances can not be affected by a contract between it and a third person, to which such employee was not a party, the contract giving such person control of its cars and requiring him to make all repairs and such company has also been held liable where a derrick used by a contractor to unload stones from a car was inadequately secured and fell on a brakeman.¹⁹

Sec. 187. Same, Supplying Railroad Bridges.

The New York court has rejected the contention that a railroad company acquiring, by purchase, an additional line already built and in operation, of which an existing bridge

¹⁸ *MORAN V. CORLISS, ETC., CO.* (1899), 21 R. I. 386; 45 L. R. A. 267; 43 Atl. 874.

¹⁹ *Gulf, etc., R. v. Shearer* (1892), 1 Tex. Civ. App. 343; 21 S. W. 133. See, also, *Gulf, etc., R. v. Delaney* (1900), 22 Tex. Civ. App. 427; 55 S. W. 538, in which case a contract for ballasting a railroad track provided that "the contractor will carry on and prosecute the work in such a manner" as the engineer of the railroad company shall direct, and that such engineer had a right to have discharged any workman not doing his work properly, and the

company was held liable for the death of one of its employees, caused by a defect in the attachments of a derrick used by the contractor in performing such work, allowing a wire cable to sag down over the track. A Minnesota case holds that the erection, fastening and operation of a material hoist constitutes a mere detail of the general work, and the apparatus is not an appliance, and hence a servant assumes the risk incident to its operation. *Gittens v. Wm. Porter Co.* (1903), 90 Minn. 512; 97 N. W. 378.

formance of which would have disclosed the defect.²³ In a Michigan case, in which the extent of the employer's duty to test the strength of a chain was discussed, the court first laid down the general rule to the same effect that railroad companies "can not be held responsible for hidden defects in tools and appliances, if they have used reasonable care in procuring them; but they are not absolved from the duty of testing or inspecting because they bought in the open market of reputable dealers, or employed competent workmen to construct them. If any defect exists which a careful inspection or test would have discovered, the master must be held to have knowledge of such defect and to be responsible for it." The court then says: "It is urged that a railroad has done all it can do, when it buys of reputable dealers material and machinery for use by its employees; that it can not, when buying, inspect, personally, every link of a chain to see whether it is properly welded. But it can do this personally, as well as it can personally do any act involved in the operation of its road. It not only can, but its duty requires that it shall, before it is placed on a car, cause every link of every chain used by its employees, in places or under circumstances involving danger in case the chain should break, to be carefully tested and inspected by some one competent to judge of its fitness for the utmost strain that is likely to come upon it. If this duty had been performed in this case, the cold weld in the chain would

²³ 1 Labatt, Master & S., p. 326, citing *DEVLIN v. SMITH* (1882), 89 N. Y. 470; 42 Amer. Rep. 311, "as explained in" *VOSBURGH v. LAKE SHORE, ETC., R.* (1884), 94 N. Y. 374; 46 Amer. Rep. 148; followed in *Butler v. Townsend* (1891), 126 N. Y. 105; 26 N. E. 1017. Where an appliance, as a float, has been constructed by a

skillful and experienced builder, the master is not liable to his servant for an injury received in its construction, and is at liberty to accept the same without inspection, was laid down in *Wittenberg v. Friederich* (1896), 8 App. Div. 433; 40 N. Y. Supp. 895; cited in note 8, Labatt, Master & S., p. 326.

does not know either the safety of the plan or the prudence of the construction, because it has purchased it completed and in use, and knows nothing of the skill or want of skill of the builder, an inspection which takes no heed of that inquiry when defects are obvious, and lack of safety is indicated and may be easily ascertained, is not sufficient. Of course, the test of actual previous use goes for something. It might justify a continuance of that use until a competent inspection could reasonably be made, but would not justify a neglect when it was made to observe and remedy obvious defects and elements of danger, because existing in the original plan and an omission to learn, by a well-understood process, whether in view of its apparent defects, it had the ordinary surplus of strength.”²¹

In a Virginia case, a train went through one of the spans owing to the fact that the falsework had been removed too soon. On the general ground that the reconstruction of a railroad bridge, without the interruption of traffic, is not an essentially hazardous undertaking, but may be effected with entire safety if ordinary care is used, the company was held not liable for such negligence of the reputable contractor employed to do the work.²²

Sec. 188. Employer's Duty to Inspect.

Similar principles (of non-liability) are sometimes applied in favor of a person who engages the services of an independent contractor to erect a structure, the rule being that one who, having no knowledge of scaffold building, employs a builder whom he knows to be skillful and experienced to erect a scaffold for the use of his employees, does not owe them a duty of inspection, the proper per-

²¹ *VOSBURGH V. LAKE SHORE, ETC., R.* (1884), 94 N. Y. 374; 46 Amer. Rep. 148.

²² *NORFOLK, ETC., R. V. STEVENS* (1899), 97 Va. 631; 46 L. R. A. 367; 34 S. E. 925.

neither the master himself nor an employee for whose acts it is sought to hold him responsible can be held negligent on the ground that they relied upon the assurance of an independent contractor that the place of work into which they were sending their servants was a safe one.²⁷

Sec. 190. Defect Known to Employer.

"Whichever of the antagonistic views of the nature of the master's liability is taken, it is manifest that the general principles, which determine the extent of the responsibility of an employer for the acts of an independent contractor, involve the corollary that the owner of premises can not dictate that his building shall be constructed of improper materials or upon an unsafe plan, and escape liability for injuries caused thereby because he made a contract with a third person to build it; nor can he, with knowledge of a weakness or defect threatening the strength of the building, set a man at work immediately under it and shift all responsibility upon the builder."²⁸

of the owners of a building being constructed was injured by the fall of a heavy post, the accident being due to the negligent construction of the building, he can not recover against such owner, *Mickee v. Walter A. Wood, etc., Co.* (1894), 77 Hun (N. Y.), 559; 28 N. Y. Supp. 918.

²⁷ *Moore v. Gimson* (1889), 5 Times L. R. 177; 58 L. J. Q. B. 169; *McInnulty v. Primrose* (1897), 24 Sc. Sess. Cas., 4th series, 442. Where a brakeman was killed by reason of stepping into a trench dug along a railroad track for the purpose of putting in target signals, his em-

ployer railroad company was negligent although it may have been dealing with an independent contractor for putting in such signals. *Southern Railway Co. v. Newton* (1908), 108 Va. 114; 51 Am. & Eng. R. Cas. (N. S.), 528; 60 S. E. 625.

²⁸ *MEIER v. MORGAN* (1892), 82 Wisc. 289; 52 N. W. 174; 33 Amer. St. 39. A master may be liable for injury to a servant caused by an obstruction placed by an independent contractor in a walk which the servant was required to use if the master or any servant whose duty it was to look after the safety of the way,

very likely have been discovered, and the chain condemned as unfit for its intended use." ²⁴

Sec. 189. Assuring Safety of Place.

The duty of a master to provide his servant with a safe place to work, it is said in a recent Illinois case, is a primary and absolute duty such as can not be delegated or assigned so as to exonerate the master from exercising care to see that it is properly performed. It cannot, therefore, be assigned to an independent contractor.²⁵ But in the same state, where a street car conductor was thrown against a pile of stones negligently left near the track by a contractor engaged to repair the pavement between the rails, the conductor was not entitled to damages from his employer for resulting injuries.²⁶ In England it has been held that

²⁴ *Morton v. Detroit, etc., R.* (1890), 81 Mich. 423; 46 N. W. 111, cited and quoted in Labatt, Master & S., p. 327, note 10. The United States Supreme Court recognizes the obligation of the master to make at least some kind of an examination or inspection. It lays down the rule that if a railroad company after purchasing an engine from a manufacturer of recognized standing, made such reasonable examination as was possible without tearing the machine to pieces, and subjected it fully to all the ordinary tests which are applied for determining the efficiency and strength of completed engines, and such examination and tests disclosed no defect, it could not, in an action by an employee of another company be adjudged guilty of negligence because there

was a latent defect that subsequently caused the destruction of the engine and injury to him. *Richmond, etc., R. v. Elliott* (1893), 149 U. S. 266; 37 Law Ed. 728; 13 Sup. Ct. R. 837.

²⁵ *CHICAGO, ETC., R. v. EATON* (1902), 194 Ills. 441; 62 N. E. 784; 88 Amer. St. Rep. 161.

²⁶ *North Chicago Street R. v. Dudgeon* (1896), 69 Ills. App. 57; (1900), 184 Ills. 477; 56 N. E. 796. Several New York cases seem to uphold the same doctrine. Thus, a servant of the owners of a building under construction can not maintain an action where he received an injury by reason of the negligence of the employees of contractors for the masonry of the building in overloading one of the upper floors with brick and stone, *McEnanny v. Kyle* (1887), 14 Daly, 268; where the servant

of duty to furnish to one, who has taken an independent contract to perform a certain portion of the work in which the master is engaged, safe appliances for the performance of such work.³¹ Opposed to this, it is said that it is the obligation of the master to furnish an independent contractor with safe appliances, or to see that those used by the latter are safe, and so protect *his own* servants, and that this grows out of his duty to provide his servants a safe place in which to work.³² A contractor is not exonerated from liability to one of his employees by reason of a defect in an appliance, because the other party to the contract was to furnish suitable appliances, where the discretion was left to the contractor with reference to the appliances to be used.³³

Sec. 194. Same, Discharge of Franchise.

In line with probably the better doctrine, it has been held that where the rails of a street railway company are being relaid under its charter and a permit granted to it by the city, negligence therein is the negligence of the company

³¹ MILLER v. MORAN, ETC., Co. (1905), 39 Wash. 631; 81 Pac. 1089; 1 L. R. A. (N. S.), 283, citing Steeples v. Panel, etc., Co. (1903), 33 Wash. 359; 74 Pac. 475, not a parallel case.

³² Note to MILLER v. MORAN, ETC., Co. *supra*, in 1 L. R. A. (N. S.), at p. 284, citing in support of the doctrine: Trainor v. Philadelphia, etc., R. (1890), 137 Penn. 148; 20 Atl. 632; Gulf, etc., R. v. Delaney, *supra*; Toledo, etc., v. Bosch (1900), 41 C. C. A. 482; 101 Fed. 530; Savannah, etc., R. v. Phillips (1892), 90 Ga. 829; 17 S. E. 82, distinguished; JACOBS v.

FULLER, ETC., Co. (1902), 67 Ohio St. 70; 65 N. E. 617; 65 L. R. A. 833; 13 Am. Neg. R. 208; Conlon v. Eastern, etc., R. (1883), 135 Mass. 195; 15 Am. & Eng. R. Cas. 99; DEVLIN v. SMITH (1882), 89 N. Y. 470; 42 Amer. Rep. 311, liability limited; NORFOLK, ETC., R. v. STEVENS (1899), 97 Va. 631; 34 S. E. 525; 46 L. R. A. 367, following N. Y.; referring also to Conway v. Furst (1895), 57 N. J. L. 645; 32 Atl. 380; Kennedy v. Manhattan Railroad (1895), 145 N. Y. 288; 39 N. E. 956.

³³ McCall v. Pacific, etc., Co. (1898), 123 Cal. 42; 55 Pac. 706.

Sec. 191. Question for Jury.

In a Canadian case the court discussed the employer's liability on the assumption that it was for the jury to determine whether the handles of a box designed to sustain a heavy weight should have been inspected by a competent person before it was put into use.²⁹

Sec. 192. Relation Between Employer and Contractor.

When a railroad company fails to exercise reasonable diligence in furnishing its employees a safe place in which to work, though the defects which make the place unsafe exist in the appliances of an independent contractor, and an employee of the railroad company is injured thereby, the railroad company is liable; *e. g.*, a contractor ballasting a track by means of derricks on each side of the track, which were insecurely anchored, thus allowed a wire cable, across the track, to sag and injure an employee; but, strictly, the liability was placed on the ground that under the contract, giving the chief engineer of the railroad company control of the work, the contractor was not an independent contractor.³⁰

Sec. 193. Same, Master's Duty to Furnish Contractor Safe Tools, etc.

A Washington court holds that an employee can not hold his master liable for injuries caused by the master's breach

had notice of it, or if it had been there so long that reasonable care in the inspection of the way would have disclosed it. *Burnes v. Kansas City, etc., R.* (1895), 129 Mo. 41; 31 S. W. 347.

²⁹ *Sims v. Dominion Fish Co.* (1901), 2 Ont. L. Rep. 69, cited in *Labatt, Master & S.*, p. 237,

n. 10. A general discussion of the proposition of submitting a question to the jury is to be found elsewhere in this volume. See Secs. 29, 72.

³⁰ *Gulf, etc., R. Co. v. Delancy* (1900), 22 Tex. Civ. App. 427; 55 S. W. 538.

pany which contracts for the erection of a train shed is not under a duty to see that the workmen in the employ of the contractor and subcontractor handle their tools with reasonable care, and hence it is not liable when a workman negligently allows a tool to fall upon one of the defendant's trainmen.³⁶

Sec 196. Same, Whether Fellow-Servants.

"In order that the rule (*i. e.*, the fellow-servant rule) should apply it is necessary that the servant injured and the servant at fault should be fellow-servants employed in the same service. They must have a common master. . . . This excludes from the category . . . the servants of such (independent) contractor in their relation . . . to the servants of another independent contractor engaged by the same employer."³⁷ Under this rule one who, at the time he was injured, did not know he had temporarily passed into the service of the party from whom he is seeking an indemnity is put upon the same footing as one who had always remained outside that service.³⁸ It has been held that the fact of a workman's being an independent contractor does not make him any the less a co-servant, in the technical sense, of those who are working for wages under the same master. But these decisions, one leading author insists, are essentially, though not in terms, inconsistent with the cases holding a master liable to a servant for the acts of

³⁶ *Fitzpatrick v. Chicago, etc., R.* (1888), 31 Ills. App. 649.

³⁷ *Huff. Agcy.*, 2d ed., Sec. 273, citing *Johnson v. Lindsay* (1891), A. C. 371.

³⁸ *Morgan v. Smith* (1893), 159 Mass. 570; 35 N. E. 101; 15 Am. Neg. Cas. 667, n. "It is far from being a matter of regret that the

courts should have restricted the defense of assumed risk of employment, to cases where the negligent and the injured servants are hired by the same master." The rule and the exception are founded ultimately on public policy. *Labatt, Master & S.*, Sec. 491.

so as to make it liable to its employees injured thereby, though the work is being done for it by a contractor. "A company seeking and accepting a special charter must take the responsibility of seeing that no wrong is done through its chartered powers by persons to whom it has permitted their exercise."³⁴ A motorman employed by a street railway company, while running his car at night, collided with cars loaded with stone ballast, resulting in his injury; the stone cars belonged to contractors who had contracted with the railway company to ballast a portion of the road and at the time of the accident were in charge and under control of the contractors' employees to whose negligence, in failing properly to manipulate a block system of electric signals, the accident was due. The railway company was held liable for the negligence of the contractor's employees. It could not shift its charter responsibility on to the shoulders of others but was responsible for whatever was done under its charter rights. The plaintiff had a right to assume that the road, signals, etc., were being used by the contractors under the supervision and control of the defendant company, and in such a manner and under such rules and regulations as to secure the safety of both.³⁵

Sec. 195. Negligence of Contractor's Servant.

The question whether an employer is answerable to his own servants for the negligence of the contractor's servants occasionally arises. It has been said that a railway com-

³⁴ North Chicago Street R. v. Dudgeon (1900), 184 Ills. 477; 56 N. E. 796. See, generally, Secs. 115-120.

³⁵ Ortlip v. Philadelphia, etc., Traction Co. (1901), 9 Pa. Dist. Rep. 291; 198 Penn. St. 586; 43 Atl. 497. Here the contract was

independent only as to the work of constructing the road bed; in all matters incident to the *use of the track* the contractors and their workmen represented the will of the company and its responsibility remained.

owner's employees, constructing a scaffold for a contracting plasterer's use, are not fellow-servants of such contractor's employee injured because of the negligent construction thereof.⁴⁴ That an independent contractor instructed his foreman to obey a general superintendent's directions, employed by the building owner to see that the various contracts were complied with, does not affect the relation of the contractor's employees so as to make them co-employees within the rule regarding fellow-servants' negligence.⁴⁵ Employees of a subcontractor and of the original contractor, who are working on the same building but not for the same master or under the same supervision, are not fellow-servants.⁴⁶ A contracting plumber's employee and the building owner's employee are not fellow-servants.⁴⁷ Servants in a general employer's hire and servants of his subcontractor or of an independent contractor are not fellow-servants unless the circumstances show that the servant submitted himself to the control of another person than his proper master and either expressly or impliedly consented to accept that person as his master for the purpose of the common employment.⁴⁸ Persons employed by different masters although engaged in a common

So. 338; *Anderson v. Boyer* (1897), 13 App. Div. 258; 43 N. Y. Supp. 87, reversed on other grounds (1898), 156 N. Y. 93; 50 N. E. 976; *Hopper v. Southern, etc., Co.* (1903), 133 N. C. 375; 45 S. E. 771. See, also, generally, *Lookout Mt., etc., Co. v. Lea* (1900), 144 Ala. 169; 39 So. 1017; 42 Am. & Eng. R. Cas. 10; *Krulder v. Woolverton* (1895), 11 Misc. 537; 32 N. Y. Supp. 742, aff'd 152 N. Y. 638; 46 N. E. 1148.

⁴⁴ *Driscoll v. Humes, etc., Co.* (1908, R. I.), 69 Atl. 766.

⁴⁵ *Coates v. Chapman* (1900), 195 Penn. 109; 45 Atl. 676.

⁴⁶ *Dale v. Hill, etc., Co.* (1904), 108 Mo. App. 90; 82 S. W. 1092.

⁴⁷ *Fisher v. Minegaux* (1906), 73 N. J. L. 424; 63 Atl. 902.

⁴⁸ *KELLY v. TYRA* (1908), 103 Minn. 176; 114 N. W. 750; 17 L. R. A. (N. S.), 334, head-note by Jaggard, J.

an independent contractor and the latter's servants. "If there is no common employment as between the servants of an independent contractor and the servants of the contractee, it is clear there can be no common employment as between the latter servants and the independent contractor himself."³⁹ In brief, the doctrine of common employment applies only where the action is brought for an injury to a servant or agent against the principal by whom such servant was himself employed.⁴⁰ The reason is that a defense, which is based on the hypothesis that, as accessory to the contract of hiring, there is implied on the servant's part an agreement to assume the risk of being injured by the negligence of his co-employee, can not properly be invoked where he is suing a person with whom he has no contractual relations.⁴¹

In the cases cited below, the contractor's employee engaged in constructing or operating railways, was held not to be a fellow-servant of a regular employee of the railroad company itself;⁴² likewise in the other cases cited of loading and unloading freight, etc.⁴³ A building

³⁹ Labatt, Master & S., 491a, criticising *Ford v. Oamaru* (1883), New Zeal. L. R., 1 Sup. Ct. 97.

⁴⁰ Labatt, Master & S., Sec. 490, citing numerous cases.

⁴¹ *Idem*, p. 1341.

⁴² *Union, etc., R. v. Billiter* (1890), 28 Nebr. 422; 44 N. W. 483; 16 Amer. Neg. Rep. 580, n.; *Norman v. Middlesex, etc., Co.* (1905), 71 N. J. L. 652; 60 Atl. 936; *Young v. New York, etc., R.* (1859), 30 Barb. (N. Y.), 229; *Brown v. Sullivan* (1888), 71 Tex. 470; 10 S. W. 288; *Sherman v. Delaware, etc., Co.* (1899), 71 Vt. 325; 45 Atl. 227.

⁴³ *Robinson v. Pittsburgh, etc., Co.* (1904), 63 C. C. A. 258; 129 Fed. 324; *Ford v. Arbuckle* (1907), 107 App. Div. 221; 94 N. Y. Supp. 1097; *John Spry, etc., Co. v. Duggan* (1898), 80 Ills. App. 394, aff'd (1899), 182 Ills. 218; 54 N. E. 1002; *Svenson v. Atlantic, etc., Co.* (1874), 82 App. Div. 500; 81 N. Y. Supp. 544; *Crawford v. The Wells City* (1899), 38 Fed. 47; *Kane v. Mitchell, etc., Co.* (1895), 90 Hun (N. Y.), 65; 35 N. Y. Supp. 581, aff'd 153 N. Y. 680; 48 N. E. 1105; *Holmes v. Birmingham, etc., R.* (1904), 140 Ala. 203; 37

of increased danger.⁵³ One railroad company permitting another company to use a section of its main line to reach a terminal point has been held liable to one of its own employees for personal injuries from the latter company's negligence in running its train over such section.⁵⁴

Sec. 198. Liability Regarding Subcontractor.

A general contractor employing a subcontractor to put in some floors which are not to be delivered as complete, is not liable for injuries to an employee from falling through a repaired portion of the floor which had not dried, as the subcontractor should have foreseen the likelihood of using the floor by other employees and should have protected the incomplete portion.⁵⁵ Where by contract between defendant and a transfer company for the removal of defendant's boiler the transfer company had nothing to do with the removal of the brick foundation of the boiler and defendant's servant while removing brick, under the order of the defendant's foreman, was killed by the boiler falling on him owing to the breaking of a chain by which the transfer company had hoisted the boiler and then had it suspended, the transfer company was not liable since it was the removal of the brick under defendant's order that caused the death.⁵⁶

⁵³ *PULLMAN, ETC., CO. v. LAACK* (1892), 143 Ills. 242; 18 L. R. A. 215; 32 N. E. 285.

⁵⁴ *Central R. Co. v. Passmore* (1892), 90 Ga. 203; 15 S. E. 760; *MACON, ETC., R. CO. v. MAYES* (1873), 49 Ga. 355; 15 Amer. Rep. 678.

⁵⁵ *St. Louis, etc., Co. v. Dawson* (1902), 30 Tex. Civ. App. 261; 70 S. W. 450. The relation existing

between servants of an original contractor and those of a subcontractor are in legal effect the same as that between employees of the principal and of the contractor. Note to *Kelly v. Tyra* (1908, Minn.), in 17 L. R. A. (N. S.), 334.

⁵⁶ *Chicago, etc., Co. v. Moren* (1900), 185 Ills. 571; 57 N. E. 733.

work are not ordinarily fellow-servants.⁴⁹ The servants of a contractor are the servants of the principal only where the latter has the right to select and control them.⁵⁰

Sec. 197. Negligence of Servants of Lessor and Others.

New Hampshire courts hold railroad companies liable for injuries received by trainmen by reason of defects negligently permitted to exist in the track of another company over which it has running powers, although the duty of keeping it in repair devolved on the latter company and the trainmen are aware of the arrangement between the two companies.⁵¹ And it has been held that a railway company's servant assumes, as an ordinary peril, the risks of injury through the negligence of the servants of another company which is operating the same line under a lease. But the application of the doctrine of assumed risk has been criticised.⁵² On the theory that the licensees were discharging a positive duty, owing by the master to his servant, it has been held that persons who, under a license from the master, put in new burners in a brick-kiln for the purpose of testing their advantages, are in the position of vice-principals, so far as relates to making such apparatus safe and suitable for the employees or giving notice

⁴⁹ Head-note by Jaggard, J., in *KELLY v. TYRA*, *supra*, citing *LARSON v. AMERICAN, ETC., CO.* (1905), 40 Wash. 224; 82 Pac. 294; 111 Amer. St. Rep. 904; *Englar v. Seattle* (1905), 40 Wash. 72; 82 Pac. 136; 19 Amer. Neg. Rep. 49; *Norman v. Middlesex, etc., Co.* (1905), 71 N. J. L. 652; 60 Atl. 936. See *DIXON v. CHICAGO, ETC., R.* (1891), 109 Mo. 413; 19 S. W. 412; 18 L. R. A.

792, as to "department rule of fellow-servants."

⁵⁰ *Burke v. Norwich, etc., R. Co.* (1867), 34 Conn. 474; 13 Amer. Neg. Cas. 662.

⁵¹ *Story v. Concord, etc., R.* (1900), 70 N. H. 364; 48 Atl. 238.

⁵² *Clark v. Chicago, etc., R.* (1879), 92 Ills. 43; *Bauer v. St. Louis, etc., R.* (1885), 46 Ark. 388. Criticised by Labatt, Sec. 49.

care to the end of promoting the contractor's safety.² But, it has been held, a house-owner is not liable where a contractor, employed to put down a stone sidewalk, falls into an unguarded excavation in the course of the operation.³

Sec. 201. Same, Relation of the Parties.

An independent contractor, as such, is not deemed a fellow-servant of the ordinary employees of the proprietor, within the meaning of the rule exonerating a master from liability for injuries done to one servant by the negligence of another servant engaged in the same common employment. The independent contractor stands on the footing of a stranger, or if he is injured through a defect in the premises of the proprietor, he is entitled, equally with a servant of the proprietor, to invoke the principle that the proprietor stands under the *absolute* duty of taking reasonable care and exercising reasonable skill to the end that the premises, tools and appliances put in the hands of his servants are reasonably safe for the purposes intended. If the contractor does not occupy this favorable position he, at least, occupies a position as favorable as that of one who is invited to come upon another's premises and who is in-

² Gardner v. Friederich (1898), 25 App. Div. 521; 49 N. Y. Supp. 1077. For liability of owners of a dry dock for letting a steamer fall, injuring it, which they were endeavoring to raise by their own methods, see Norwich, etc., Co. v. New York, etc., Co. (1884), 22 Fed. 672. See, generally, note 37, Thomps. Neg., Sec. 625. "A. owned a building on which B. agreed for a lump sum to trim certain stonework. B. should have furnished his own scaffold

but as he did not, A. allowed him to use one which had been hung by painters over a rotten cornice which gave way and injured B. It was held that A. was not liable to B.," citing Mathes v. Kerrigan (1886), 53 N. Y. Super. 431.

³ Schweikardt v. St. Louis (1876), 2 Mo. App. 571. (The possibility of the plaintiff's being entitled to recover on the ground of the intrinsic danger of the work was not discussed. See Secs. 65, 66, 72, 115, *ante*.)

CHAPTER VIII.

EMPLOYER'S LIABILITY TO CONTRACTORS AND THEIR SERVANTS.

SECTION	SECTION
200. Employer's liability to contractors, generally.	206. Liability as to condition of premises.
201. Same—Relation of parties.	207. Same—Employer controlling or directing work.
202. Same—Liability on contract.	208. Same—Safety of premises.
203. Liability, generally, to contractors' servants.	209. Same—Employer accepting work.
204. Joint liability of employer and contractor.	210. Same—Competency of co-workers.
205. Relation of parties.	211. Contributory negligence.

Sec. 200. Employer's Liability to Contractors, Generally.

It is the rule that the owner of property owes to an independent contractor and his servants, at work thereon, the duty of exercising reasonable care to have the premises in a safe condition for the work, unless the defects occasioning the injury were known to the contractor.¹ Where a proprietor engages an independent contractor to do work upon his premises, the contractor, while executing the work, will be there in pursuance of the invitation of the proprietor and the proprietor will, under general principles, be under the duty of exercising ordinary or reasonable

¹ John Spry, etc., Co. v. Duggan (1898), 80 Ills. App. 394; Sesler v. Rolfe, etc., Co. (1902), 51 W. Va. 318; 41 S. E. 216; Hoadley v. International, etc., Co. (1899), 72 Vt. 79; 47 Atl. 169; Barowski v. Schultz (1901), 112 Wisc. 415; 88 N. W. 236. Cf., Sack v. St. Louis, etc., Co. (1905), 112 Mo. App. 476; 87 S. W. 79.

taking to perform a given work as an independent contractor.⁷

Sec. 203. Liability, Generally, to Contractor's servants.

"The proprietor does not owe to a person, employed on his premises in the service of an independent contractor, the duty to furnish a safe place to work or safe appliances, and is not liable in damages for injuries occasioned by his failure to do so. This duty belongs to the servant's master."⁸ "The decisions under this head do not seem to be very clear or harmonious, but the governing principle is not difficult of ascertainment. Roundly stated, it is that the relation of master and servant does not subsist between the proprietor and the servants of the contractor and therefore those obligations which the law imposes upon the master for the protection of one injured while in his service, do not rest upon the proprietor but on the contractor."⁹ In the absence of any evidence tending to show

⁷ As illustrative cases, see *Talbot v. Board, etc.* (1908, Ind.), 85 N. E. 376; *Hunt v. Boston, etc., R. Co.* (1908, Mass.), 85 N. E. 446; *National, etc., Co. v. Foster, etc., Co.* (1908, Ind.), 85 N. E. 489.

⁸ *White's Supp. to Thomps. Neg.*, p. 101, citing *Omaha, etc., Co. v. Hargadine* (1904, Nebr.), 98 N. W. 1071; 36 Am. & Eng. Ry. Cas. (N. S.), 827; *Callan v. Pugh* (1900), 66 N. Y. Supp. 1118; 54 App. Div. 545; *Southern Oil Co. v. Church* (1903), 32 Tex. Civ. App. 325; 74 S. W. 797; 75 S. W. 317; 16 Am. Neg. R. 611, n.; *contra*, *Kentucky, etc., Co. v. Bryan* (1905, Ky.), 84 S. W. 537. The proprietor does not owe the

same duty to a servant of an independent contractor for the construction of a building upon the premises of the proprietor, which he would owe to his own servants if he were doing the work by means of his own servants; but such duty devolves upon the contractor. *Humpton v. Unterkircher* (1896), 97 Iowa, 509; 66 N. W. 776; 14 Am. Neg. Cas. 595.

⁹ *Thomps. Neg.*, Sec. 680. The owner of real property does not owe to a person employed on his premises in the service of an independent contractor the duty to furnish a safe place to work and for omission to do so he is not liable in damages. He merely owes the duty to commit no act

jured in consequence of a dangerous pitfall therein.⁴ Where two independent contractors are engaged for one employer upon the same job (*e. g.*, one to do mason work and another carpenter work) and in consequence of the negligence of one the other or his work is injured, he can not recover of the employer unless he was in fault in selecting the wrong-doing contractor.⁵ It is to be observed that the owner is not charged with the absolute duty of having the premises safe; his duty is discharged by the exercise of reasonable care.⁶

Sec. 202. Same, Liability on Contract.

The ordinary rules as to legality of contract, construction of its terms, performance of conditions precedent, measure of damages, public policy, and the like, govern in cases involving the liability of the employer to one under-

⁴ See *Thomps. Neg.*, Secs. 679, 967. When a ladder hole had been cut in a platform to a mine while the mine was in active operation, by the direction of the superintendent of the mine, and an employee of the mine owners fell through the hole and was injured, because it was not guarded or lighted and he had not been warned, the mine owners were held responsible, and it was held immaterial whether plaintiff was a servant or independent contractor. *Mayhew v. Sullivan* (1884), 76 Me. 100. It has been held that one engaged in selling and delivering wood to a mill proprietor at so much per cord is not the proprietor's employee so as to put him in the situation of one

who takes the risk upon himself of the negligence of those running the mill. The court says that as to the proprietor, he stands "precisely as any other man stands who, in consequence of his business wants, had occasion to visit the mill." *Wadsworth v. Duke* (1873), 50 Ga. 91. The repairer of apparatus in a paper mill was steamed to death owing to the negligence of the defendant in failing properly to protect him while at work, and the proprietor was held liable. *Hoadley v. International, etc., Co.* (1899), 72 Vt. 79; 47 Atl. 169.

⁵ *Treadwell v. New York* (1861), 1 Daly (N. Y.), 123.

⁶ *McKeon v. Louis Weber, etc., Co.* (1903), 84 N. Y. Supp. 913.

Sec. 205. Relation of Parties.

Circumstances may exist which create or establish the relation of master and servant between one employer and his contractor's servant, for examples of which see the cases cited in the foot note.¹³ X. contracted with prison directors for convict labor on a building being erected, the convicts to remain in the custody of the guards while at work; plaintiff, a convict, was assigned to operate an elevator and while on duty was hurt; it was held that the relation of master and servant so far existed between X. and the plaintiff that X. was liable for any injury resulting from his failure to exercise reasonable care in providing safe machinery.¹⁴ A railway news agent, riding on a train in the usual course of his employment, whose transportation is merely an incident to a contract between his employer and the railway company permitting the employer to sell certain goods on the train, is not a passenger within the meaning of a Pennsylvania statute providing

pany was not liable since it was the duty of the sons as contractors to have warned their father of the danger from this act. *Proctor v. San Antonio Street R.* (1901), 26 Tex. Civ. App. 148; 62 S. W. 939.

¹³ *Chicago v. Robbins* (1862), 2 Black (U. S.), 418; *Solomon Railroad v. Jones* (1833), 30 Kans. 601; 2 Pac. 657; 15 Am. & Eng. R. Cas. 201; *Good v. Johnson* (1907), 38 Colo. 440; 88 Pac. 439; 8 L. R. A. (N. S.), 896. See, also, Chap. I, *ante*.

¹⁴ *Baltimore, etc., Co. v. Jamar* (1901), 93 Md. 404; 49 Atl. 847; 85 Amer. St. Rep. 428. A person employed by one who has entered into a contract with a railroad

company to do a job of work on its road, is obviously entitled to reasonable care, and this, although the contractor may have entered into an agreement with the railroad company whereby the latter is released from all claims for injuries to subcontractors, workmen, and others, by reason of the negligence of the servants of the railroad company. Such an agreement is inoperative as against the employee of the contractor unless he is made privy to it in some other way than by the mere fact of being employed by the contractor. *Ominger v. New York, etc., R.* (1875), 4 Hun (N. Y.), 159.

bad faith in a subcontract for the construction of a railroad track, the question of bad faith should not be submitted to a jury in an action to hold the contractor liable for injuries to an employee of the subcontractor.¹⁰ A railroad company must take notice of the fact that workmen of its contractor are at work on its trestles and run its trains with care proportionate to the danger of the men so employed.¹¹

Sec. 204. Joint Liability of Employer and Contractor.

If a contractor undertakes to place a structure on foundations to be furnished by the landowner and the landowner knowingly furnishes an insufficient foundation, and the contractor knowing of such insufficiency, directs his employees to work on the structure and they are injured in consequence of the giving way of the foundation, a joint recovery may be had against the owner and the contractor.¹²

of affirmative negligence. *Callan v. Pugh* (1900), 54 App. Div. (N. Y.), 545; 66 N. Y. Supp. 1115. In *Vincennes, etc., Co. v. White* (1890), 124 Ind. 376, 380, the court says: "It appears from the evidence in this cause that the appellee (a contractor's servant) was injured by the caving in of a ditch which he was assisting to construct through a soil composed largely of sand and gravel. The liability of the trench to cave in by reason of the peculiarity of the soil and the danger attending the work were open alike to the observation of all the parties. It has been repeatedly held that under such circumstances there

can be no recovery." Citing cases.

¹⁰ *GOOD v. JOHNSON* (1907), 38 Colo. 440; 88 Pac. 439; 8 L. R. A. (N. S.), 896.

¹¹ *Interstate, etc., R. Co. v. Fox* (1889), 41 Kans. 715; 39 Amer. & Eng. Ry. Cas. 318; 21 Pac. 797.

¹² *CONSOLIDATED, etc., Co. v. KEIFER* (1890), 134 Ills. 481; 25 N. E. 799; 10 L. R. A. 696; 20 Amer. St. Rep. 688. The father of contractors engaged in the removal of cinders from the yard of an electric company was killed by a shock of electricity communicated through a metal hoe which he hung over a wire while raking down a pile of cinders thereunder. The electric com-

contract for its operation by another person upon such a footing that the latter is put in full control of the work, and charged with the duty of seeing that the appliances, which are used, are kept in safe condition, is not liable to the servant of the contractor who is injured by the breaking of the rope by which the cage is lowered and hoisted.¹⁷ The lessor of a railroad is not liable, as master, for injuries to the employees of the lessee.¹⁸ A city contracted with X. to take down and rebuild a bridge used as a highway over a railroad's track. In doing so, as more men were needed, temporarily, on one side the bridge than were there at work, they were called across to that side; had a larger force been employed they need not have crossed the track. Held: An action would not lie against the railroad company for an injury to a workman by being struck by a locomotive while so crossing the track.¹⁹

structed on the right of way of a railroad company are not trespassers while leaving a dirt train on the passage track and crossing the main track, where the passage track was located by the railroad company for the contractor's use and such use was by the permission of the railroad company. *Southern Railroad v. Drake* (1902), 107 Ills. App. 12.

¹⁷ *Shaw v. West, etc., Co.* (1872, Ct. of Sess.), 9 Scot. L. R. 254; *Lendberg v. Brotherton, etc., Co.* (1839), 75 Mich. 84; 42 N. W. 675. It has been held that the control given to a mine owner by the English Coal Mines Regulation Act of 1887, and rules thereunder, over persons working in the mine, for the purpose of carrying on the mining operations without danger, does not make

"sinkers" employed by independent contractors to sink a shaft in the mine, "workmen" in the employ of the owners, within the meaning of the English Employers' Liability Act, so as to make the owners liable for injuries to the sinkers. *Marrow v. Flimby, etc., Co.* (1898), 2 Q. B. 588.

¹⁸ *EAST LINE, ETC., R. v. CULBERSON* (1888), 72 Tex. 375; 10 S. W. 706; 13 Am. St. Rep. 805; 3 L. R. A. 567.

¹⁹ *Sweeney v. Boston, etc., R.* (1878), 128 Mass. 5; 1 Amer. & Eng. R. Cas. 138. "While in the majority of cases in which the question, Who are independent contractors? is involved, the ultimate inquiry is the liability for some act of negligence on the part of the contractor or his servant, it should be noted that

that "when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the premises of a railroad company or in or about any train or car therein or thereon, of which said person is not an employee, the right of action against the company shall be such only as would exist if such person were an employee," but further providing that the statute shall not apply to passengers.¹⁵ Where a railroad company furnished and hauled a car loaded with concrete for a contractor, who was building piers in the company's yard for an overhead highway bridge, the car being loaded and unloaded by the contractor's employees, such employees were rightfully about the car while unloading and as well entitled to safety from any unusual danger in being near it as a consignee unloading and taking away freight at a depot.¹⁶ The owner or lessee of a mine who has made a

¹⁵ *SMALLWOOD V. BALTIMORE, ETC.*, R. (1906), 215 Penn. St. 540; 64 Atl. 732; 7 Am. & Eng. Ann. Cas. 525, in which latter report the annotater says: "The reported case seems to be the only one in which the fellow-servant rule has been adopted with regard to news agents, the few other cases on the subject uniformly regarding such persons as passengers," citing cases. It has been held, under statute, that the presumption of negligence imposed upon railroad companies in all cases where injury ensues by reason of the running of cars, etc., arises in favor of an employee whenever it is affirmatively shown that he has been injured "by the running of the locomotives, cars, or other machinery" of the company, and that he himself was without fault.

This general rule applies though at the time of the injury to a fireman neither the engine nor the fireman is engaged in the usual or ordinary business of the company as a common carrier, they having been lent by the railroad company to a contractor, under whose directions they are engaged in constructing an extension of the road, so that, where the engine is derailed by reason of its defective condition, injuring the fireman, the presumption is that such defective condition was due to the negligence of the railroad company. *Savannah, etc., Railroad v. Phillips* (1892), 90 Ga. 829; 17 S. E. 82.

¹⁶ *Ryan v. New York, etc., R.* (1902), 115 Fed. 197. Employees of a railroad company's contractor working on a passage track con-

etc., as approved by him. That duty devolves on the contractor.²¹ Recovery was denied in a case where a bridge gave way under a train, while it was being constructed, resulting in the death of a servant of the contractor constructing the bridge.²² Where the owner of a building contracts with a builder to re-arrange the building according to certain plans, and while he is in possession, the plaintiff, in the employ of a company doing some electric work in the building, falls through a hole in the floor which is concealed by rubbish, the owner is held not responsible for the resulting injury.²³ Where the owner of a building damaged by fire employed a contractor to make repairs, he was held not liable for injuries to his contractor's servants, due to his unfamiliarity with its interior arrangement.²⁴ Where a servant of a contractor engaged

²¹ *Hawke v. Brown* (1898), 50 N. Y. Supp. 1032. Circumstances under which a defect in the design of a steam plant in failing to provide for a drip or trap to allow the escape of water formed by the condensation of steam, did not render the owner liable for injuries to an employee of a sub-contractor who was hit by the cap of a steam pipe which was blown off. *James v. Philadelphia Traction Co.* (1898), 185 Penn. St. 75; 39 Atl. 889.

²² *BIBB v. NORFOLK, ETC., R.* (1891), 87 Va. 711; 14 S. E. 163; 47 Amer. & Eng. Ry. Cas. 651. An action for injuries received by the giving way of the floor of a building which the plaintiff's employer (an independent contractor) was taking down, was held to have been properly dismissed, although the plaintiff's

counsel offered to prove that the defendant knew of the contractor's incompetency. *Schipp v. Pabst Brewing Co.* (1896), 64 Minn. 22; 66 N. W. 3.

²³ *Hogan v. Arbuckle* (1902), 73 App. Div. (N. Y.), 591; 77 N. Y. Supp. 22, following *Murphy v. Altman* (1898), 28 App. Div. (N. Y.), 472; 51 N. Y. Supp. 106.

²⁴ *Butler v. Lewman* (1902), 115 Ga. 752; 42 S. E. 98, also holding that one contracting for the repair or tearing down of a building destroyed by fire is under the duty of guarding the servant of an independent contractor against the danger of his employment. The owner of premises who had contracted for the erection of a building thereon, was held not responsible where a wall fell on the servant of a person who had taken a subcontract for excava-

Sec. 206. Liability as to Condition of Premises.

In almost every case where a proprietor engages an independent contractor to do work upon his premises, there is the further implication that if the contractor brings third persons, his own employees, his partners or assistants, to help him in executing the contract, such persons are presumably upon the premises by the invitation of the owners, and he owes them the same measure of care, to the end of promoting their safety, that he owes to the contractor himself and this though no contractual relation exists between himself and them. But the cases are not uniform.²⁰ The owner can not be held liable to an employee of a subcontractor for failure to furnish personally a copy of the plans,

the question also arises in connection with an inquiry into the liability to the contractor's servant for negligence on the part of the principal or his employee, in which case it becomes a branch of the question as to which of two parties is to be deemed the master of the servant of one of them and of the question when servants of the principal employer and (of) the contractor are to be deemed fellow-servants." Note to *Knically v. R. Co.* (1908, W. Va.), 17 L. R. A. (N. S.), 371.

²⁰ *John Spry, etc., Co. v. Duggan* (1898), 87 Ills. App. 394; *Webster, etc., Co. v. Mulvanny* (1897), 68 Ills. App. 607; 168 Ills. 311; 48 N. E. 168; *Liebold v. Green* (1897), 69 Ills. App. 527; *Mason v. Tower, etc., Co.* (1895), 83 Hun (N. Y.), 479; 32 N. Y. Supp. 36; *Drennen v. Grady* (1897), 167 Mass. 415; 45 N. E. 741; *SAMUELSON v. CLEVELAND, ETC., Co.*

(1882), 49 Mich. 164; 13 N. W. 499; 43 Amer. Rep. 456; *POWERS v. HARLOW* (1884), 53 Mich. 507; 51 Amer. Rep. 154; *EVANSVILLE, ETC., R. v. GRIFFIN* (1885), 100 Ind. 221; 50 Amer. Rep. 783; *Welch v. McAllister* (1884), 15 Mo. App. 492; *Bennett v. Louisville, etc., R.* (1880), 102 U. S. 577; *Indemaur v. Dames* (1866), L. R., 1 C. P. 274; *Heaven v. Pender* (1883), L. R., 11 Q. B. 503. "On the other hand, the servant of the contractor must be deemed to be upon the premises of the proprietor by his invitation, express or implied; and, therefore, he owes him the same duty of guarding him against the consequences of hidden dangers on the premises, that a proprietor would in any case owe to a guest, a customer, or other person coming by invitation upon his premises." *Thomps. Neg.*, Secs. 680, 979.

The rule is the same between contractor and subcontractor as between owner and contractor, and such contractor will be liable to the servant of a subcontractor for injuries due to a failure to exercise a reasonable degree of care as to the condition of the premises upon which he is employed.²⁸

Sec. 207. Same, Employer Controlling or Directing Work.

In an early case the defendants were held liable on the following facts: Defendants, in order to remove some flour in barrels from their warehouse, employed W., a master porter, who used his own tackle and brought and paid his own men; W. employed T., a master carter, to carry the barrels away; T. sent his own carts and his own men, among them the plaintiff who was injured by having a barrel fall on him in consequence of part of W.'s tackle falling while being used by W.'s men. Recovery was apparently allowed on the theory that the person engaged to do the work, and his servants, were deemed servants of the defendants while the work was in progress and under his

against a piece of marble belonging to the defendant, knocking it down on the decedent and killing him. The defendant was held not liable, as the piece of marble belonging to him which fell on decedent, was held to have been lawfully in its place and secure from ordinary interference and further as the proximate cause of decedent's death was the negligence of his co-employee. *Connolly v. Rist* (1897), 45 N. Y. Supp. 321.

²⁸ *Norman v. Dowd* (1903), 83 N. Y. Supp. 693. The negligence

for which the contractor will be liable must be some act of personal negligence on his part which caused the accident, independently of all other causes. Thus, in a case of injuries to an employee of a subcontractor by the fall of a building, it was held competent to show knowledge of the dangerous condition by the contractor long before the happening of the accident. *Nelson v. Young* (1904), 91 App. Div. (N. Y.), 457; 87 N. Y. Supp. 69; affirmed 180 N. Y. 523; 72 N. E. 1146.

in sinking an airshaft in a mine was injured by an explosion of gas, the mine-owner has been held not liable.²⁵ The licensees of a mine contracting with a third person to mine the ore and divide the products, were held obligated to see that the mine was in a reasonably safe condition.²⁶ A statute requiring the contractors or owners of a building in course of construction to enclose the openings in each floor on which a hoisting apparatus is operated, places this duty on the owner of the building as to an employee of an independent contractor as well as on the contractor, and this though all the work on the building is being done by independent contractors, and the hoisting machine is installed by a company which is paid by the contractors.²⁷

tion work. *Hale v. Johnson* (1875), 80 Ills. 185; 14 Am. Neg. Cas. 417, n. Where the roof of a drift, which was left unsupported, fell on a laborer in the employ of a person operating the mine under a contract, the owner's liability was denied. *Smith v. Belshaw* (1891), 89 Cal. 427; 26 Pac. 834. Cf., *SAMUELSON v. CLEVELAND, ETC., Co.* (1882), 49 Mich. 164; 13 N. W. 499; 43 Amer. Rep. 456.

²⁵ *Welsh v. Lehigh, etc., Co.* (1886, Penn.), 5 Atl. 48; *Welsh v. Parrish* (1892), 148 Penn. 599; 24 Atl. 86. A railway company was held not liable where the servant of the contractor for the construction of a railway was injured through breathing the exhalations from a poisonous mixture which the contractor had applied to some timber to prevent its decaying. *West v. St. Louis, etc., R.* (1872), 63 Ills. 545.

²⁶ *Rice v. Smith* (1902), 171 Mo. 331; 71 S. W. 123. See, as to licensees, generally, *ante*, Secs. 38g, 91, 126-134. A mine owner was held not responsible where the mouth of a pass leading from a higher to a lower level in a mine was left uncovered and unlighted through the negligence of the person operating the mine under an independent contract. *Martin v. Sunlight, etc., Co.* (1896), 17 New South Wales L. R. 364.

²⁷ *Rooney v. Brogan, etc., Co.* (1905), 95 N. Y. Supp. 1. In another New York case, defendant owned a marble sawing yard. He let some of his saws to X., who conducted an independent business in defendant's yard. Decedent, who was in X.'s employ, together with some co-servants, undertook to move some marble slabs belonging to X. In doing so, a slab was swung

Sec. 208. Same, Safety of Appliances.

Where the owner of a building caused a stage to be erected for use by one who had contracted with him to supply the building with fire extinguishing apparatus, and the staging was constructed in a negligent manner in consequence of which an employee of the contractor was killed, the owner was liable for the employee's death although no contractual relation existed between them.³³ An employee, of a contractor employed by the owner of a sawmill to do the manual work required to manufacture blocks into shingles, while the owner furnishes and operates the machinery for the purpose, may recover of the owner for injuries caused by a failure to furnish reasonably safe machinery, since the relation of master and servant exists between such employee and the owner.³⁴ A manufacturer contracting with a third person for the manufacture of his product and furnishing a dangerous machine without instructions, was held liable for injury to an employee of such third person.³⁵ One who contracts for the sinking of

³³ *BRIGHT v. BARNETT, ETC., Co.* (1894), 88 Wisc. 299; 60 N. W. 418; 26 L. R. A. 524. The owner of a building in which there is a dumb waiter operated by hand, owes no duty of inspection to one who is not his servant, but who is employed by the janitor of the building, and who is not an employee of the owner. *Sellers v. Dempsey* (1898), 49 N. Y. Supp. 765; a decision which is declared by Judge Thompson to be unsound. *Thomps. Neg.*, p. 899. In a Texas case, a proprietor was held not liable for injuries to the servant of his contractor by reason of the defective condition of

a derrick furnished by him in the absence of proof that it was inherently dangerous. *Southern Oil Co. v. Church* (1903), 32 Tex. Civ. App. 325; 74 S. W. 797; 75 S. W. 817; 16 Am. Neg. R. 611, n.

³⁴ *Niemeyer v. Weyerhaeuser* (1895), 95 Iowa, 497; 64 N. W. 416; *contra*, *REIER v. DETROIT, ETC., WORKS* (1896), 109 Mich. 244; 67 N. W. 120; 16 Am. Neg. Cas. 30, n.; 4 Amer. & Eng. Corp. Cas. (N. S.), 459, which see. Cf., *Anderson Bros. Co. v. Burns* (—), 22 Ohio C. C. 437.

³⁵ *JACOBS v. FULLER, ETC., Co.* (1902), 67 Ohio St. 70; 65 N. E. 617; 65 L. R. A. 833; 13 Am.

control.²⁹ Where a mining company, contracting for the removal of ore, reserves to itself such arrangements as are necessary for the protection of workmen, it is liable for such injuries as happen to employees of the contractor without the fault of the employees.³⁰

A proprietor who personally interferes in the work is responsible for any injury to a servant of the contractor occasioned by such interference whether such contractor is independent or not.³¹ If the owners of a building employ a contractor to alter and improve it and forbids the contractor to take down a dangerous wall where he is to build a stack near it, and the dangerous character of the wall is open and obvious, and in consequence of the necessary digging by the contractor, to obtain a foundation for the stack, the wall falls and injures a servant of the subcontractor, the proprietor will be liable; because in such case he would have been liable, as for a nuisance, if it had fallen outward and injured a stranger on the sidewalk.³²

²⁹ *Randleson v. Murray* (1838), 8 Ad. & El. 109. Cf., *Milligan v. Wedge* (1840), 12 Ad. & El. 737; criticised in *Murphy v. Caralli* (1864), 3 Hurst., etc., 462. If the employer (a vessel master) retains control of the work in whole or in part, and through his interference or orders an injury happens to a servant of the independent contractor (a master stevedore), or to a third party, the employer is liable. *Morrell v. Rheinfrank* (1885), 24 Fed. 94; *Kilroy v. Delaware, etc., Co.* (1890), 121 N. Y. 22; 24 N. E. 192.

³⁰ *LAKE SUPERIOR, ETC., Co. v. ERICKSON* (1878), 39 Mich. 492; 33 Amer. Rep. 423. Cf., *Callan*

v. Pugh (1900), 54 App. Div. (N. Y.), 545; 66 N. Y. Supp. 1118.

³¹ *FAREN v. SELLERS* (1887), 39 La. Ann. 1011; 3 So. 363; 4 Amer. St. Rep. 256. A corporation with which a person contracts to do work at a specified price per piece, using the corporation's machinery and power, the contractor employing and paying the hands, is liable as employer for an injury to one of the hands so employed where it exercises control over the hands, or the manner in which the work is done, or the means by which it is done. *Wallace v. Southern, etc., Co.* (1897), 91 Tex. 18; 40 S. W. 399.

³² *Pender v. Raggo* (1896), 178 Penn. St. 337; 35 Atl. 1115.

of the arrangement.³⁸ One on whose building a roof was being raised was held to owe no duty to barricade the sidewalk or give warning to protect against falling brick, one who had previously been employed on the work in progress and therefore occupied a different position from that of a passerby using the sidewalk in the usual way.³⁹

Sec. 209. Same, Employer Accepting Work.

A religious society's agents contracted with plaintiff's employer to do certain painting for a gross sum and not subject to the society's control. The defendant society undertook to erect and remove a staging to be used by plaintiff's employer, and through its agents selected and employed a carpenter for a gross sum and not subject to its control to erect and remove the scaffold and to furnish the material and labor therefor. The plaintiff's

appliances furnished by him, is bound to see that the vessel and appliances are reasonably safe for the purposes indicated; he owes this duty to the master stevedore and he owes a commensurate duty to such stevedore's servants. *Thomps. Neg.*, Sec. 636, citing *The Rheola* (1884), 19 Fed. 926.

³⁸ *Broslin v. Kansas City, etc., R.* (1897), 114 Ala. 398; 21 So. 475; 9 Amer. & Eng. Ry. Cas. (N. S.), '99. "The company had knowledge that the cars were being used by the coal company and that the coal company was necessarily using them through the instrumentality of its employees, and that was enough to raise a duty towards the employees of the coal company to see that they were reasonably

safe for the purposes for which they were supplied." *Thomps. Neg.*, p. 899, note 156. Where a street railway company entered into a contract with another company, by which the latter was entitled to use of the poles of the former, it was not liable for an accident to an employee of the latter company caused by the breaking of an unsafe pole, where the company furnishing the pole had no knowledge of the employment in the service of which he was engaged. *San Antonio, etc., Co. v. Dixon* (1897), 17 Tex. Civ. App. 320; 42 S. W. 1009, criticised as unsound in *Thomps. Neg.*, 900, note 156.

³⁹ *Smith v. Humphreyville* (1907, Tex. Civ. App.), 104 S. W. 495.

a shaft on his property, agreeing to furnish the necessary tools, including a hoist, while the other party is to furnish the labor, is not answerable to laborers for the continued safety of the machinery furnished; so that no recovery can be had against him for injuries to an employee through the breaking of a rope used on the hoist which is sufficient, when furnished, but is allowed by the contractor to become defective.³⁶ A shipowner who undertook to furnish and put in place a span to be used in connection with the discharge of a cargo by the contractor, was required to exercise reasonable care to furnish one fit for the work for which it was to be used, and was liable to a servant of the contractor for failure to exercise such care.³⁷ An employee of a coal company, who has an arrangement with his employer to ride upon empty cars while they are being switched, for the purpose of loading them with coal, and to apply brakes to stop them at the right place, it is held, has no right of action against a railroad company for an injury caused by a defective brake upon a car furnished by the company, where the company had no knowledge

Neg. R. 208; 16 Id. 611, n. In Kentucky it was held that a person owning and operating machinery is required to use reasonable care to make it safe for the protection of persons working in its vicinity, regardless of whether the person is an employee of the owner or is at work under an independent contractor. Kentucky, etc., Co. v. Bryan (1905), 27 Ky. L. R. 136; 84 S. W. 537.

³⁶ CENTRAL COAL & IRON Co. v. GRIDER'S ADMR. (1903), 115 Ky. 745; 74 S. W. 1058; 65 L. R. A. 455; 16 Am. Neg. R. 610, n. An employer who furnishes a contractor with a safe appliance will

not be liable for injuries to the servants of the contractor resulting from defects due to wear incident to its use. Central, etc., Co. v. Bailey (1903), 28 Ky. L. R. 873; 76 S. W. 842.

³⁷ Mason v. Tower Hill Co. (1895), 83 Hun (N. Y.), 479; 32 N. Y. Supp. 36. Although the relation of master and servant may not exist between the ship owner or charterer and the servants of the stevedore, yet this does not negative the implication of law that such owner or charterer, inviting the stevedore's servants to come upon his ship and to do work thereon with

not uniform as to the liability of an employer for the incompetency or negligence of his own servants resulting in injury to the servants of the independent contractor. Thus, a dock-owner who let to a stevedore an engine and an engineer to run it, has been held liable for an injury to such stevedore's employee through the engineer's negligence.⁴² In a leading Georgia case a track-layer in the contractor's employ was held entitled to recover from the railroad company for injuries received while he was traveling as a passenger on a train operated by the contractor.⁴³ The owner of a building in exclusive possession of an elevator therein, is responsible for the negligence of the operator in injuring the servant of a contractor who has undertaken to paint the shaft, when the work is being done at the bottom of the shaft below the car, although prior thereto the car had been used by the contractor as a movable staging for the use of his men.⁴⁴ It is the duty of the operatives of trains to exercise due care to avoid injury to employees of contractors who are lawfully on the railroad premises.⁴⁵ The

⁴² *Coyle v. Pierrepont* (1885), 37 Hun (N. Y.), 379. But a ship owner is not liable for injuries received by a servant of a stevedore through the negligence of his fellow-servants in failing to replace a grating over a hatchway, or in exposing a trimming hatch by the removal of dunnage. *Dwyer v. National Steamship Co.* (1880), 17 Blatchf. 472; 4 Fed. 493; *In re the Wm. F. Babcock* (1887), 31 Fed. 418. Cf., *RILEY v. STATE LINE STEAMSHIP CO.* (1877), 29 La. Ann. 791; 29 Amer. Rep. 349.

⁴³ *MACON, ETC., R. v. MAYES* (1873), 49 Ga. 355; 15 Amer. Rep. 678.

⁴⁴ *PERRY v. PAYNE* (1907), 217 Penn. 252; 66 Atl. 553; 11 L. R. A. (N. S.), 1173.

⁴⁵ *Sheltrawn v. Michigan, etc., R.* (1901), 128 Mich. 669; 87 N. W. 893. It is the duty of the servants of a switch company operating trains in its yards to keep a lookout for car repairers who are permitted by the switch company to repair the cars of their employers in the switch yard. *KENTUCKY, ETC., CO. v. SYDOR* (1904), 119 Ky. 18; 82 S. W. 989; 68 L. R. A. 183. It has been held that a person at work on an elevated railroad structure as an employee of a subcontractor thereon was a licensee to whom

employer did not and could not know from the appearance or from examining the staging whether it was or was not strong enough for his workmen to go upon. The staging, being defective, fell, injuring plaintiff. There was no evidence that the defendant society or its agents took any part in erecting the staging or in directing its erection beyond making the contract with the carpenter, or that they were guilty of any negligence in employing the carpenter to erect it. But the society was held liable to the plaintiff by reason of having accepted the staging and induced the carpenter's workmen to come thereon; but that the agents were not jointly liable with the society.⁴⁰

Sec. 210. Same, Competency of Co-workers.

A master owes to his servants the duty of exercising ordinary and reasonable care to the end that the fellow-servants with whom he is engaged to work are fit, competent and sober men; but the proprietor of a building who employs an independent contractor to tear it down does not become liable to a servant of such contractor for an injury received through the contractor's incompetency, although such incompetency may have been known to the proprietor at the time of letting the contract.⁴¹ The decisions are

⁴⁰ *Mulchey v. Methodist, etc., Society* (1878), 125 Mass. 487; 6 Reporter, 756; 15 Am. Neg. Cas. 661, n. A railroad company entered into a contract with X. to do the mason work of a round-house, the contractor to build his own scaffolding, the railroad company furnishing the material; the master mechanic of the company arranged with the contractor that the railroad company should build the scaffold for the car-

penters and that after they were done using it, the contractor might use it if he wished, but on his own responsibility as to its safety for his work; while the contractor was so using it, it fell, hurting one of his employees; the railroad company was held not liable for the injury. *Larock v. Ogdensburgh, etc., R.* (1882), 26 Hun (N. Y.), 382.

⁴¹ *Schipp v. Pabst Brewing Co.* (1896), 64 Minn. 22; 66 N. W. 3.

CHAPTER IX.

CONTRACTOR'S LIABILITY—SUBCONTRACTORS.

SECTION	SECTION
215. Contractors' liability, generally.	224. Same—Injury to vendee's servant.
216. Same—Relation of parties.	225. Same—Condition of employer's premises.
217. Same—Statutory right.	226. Same—Contractor's legal representative.
218. Same—Negligent performance of work.	227. Same—Injury to employer's tenant.
219. Same—Following defective plans, etc.	228. Same—Acceptance by employer.
220. Same—Acts of employer.	229. Same—Indemnity to employer.
221. Same—Injury to wrongdoer.	230. Subcontractors.
222. Same—Injury to his own servant.	
223. Same—Between contractors and their servants.	

Sec. 215. Contractor's Liability, Generally.

The contractor, like any one else, is liable for the consequences of his own negligent acts without reference to the doctrine of independent contractors.¹ He must answer for his own wrongs and those of his servants in the course of the work.² He is especially liable for his own acts when he assumes this liability in his contract of employment.³ Where a contractor under the charter of a turnpike com-

¹ *Schutte v. United, etc., Co.* (1902), 68 N. J. L. 435; 53 Atl. 204; 16 Am. Neg. R. 614, n.; *Bill v. New York, etc., Co.* (1901), 69 N. Y. Supp. 989; *Straus v. Buchanan* (1904), 89 N. Y. Supp. 226.

² *Holt v. Wheatly* (1874), 51 Ala. 569; *Shaw v. Crocker* (1871), 42 Cal. 435.

³ *Chicago, etc., Co. v. LaMantia* (1904), 112 Ills. App. 43.

owner of premises upon which there is a private railroad track owes to one employed by a contractor on his premises near the track the duty to exercise ordinary care to avoid injury to him from cars passing on the track.⁴⁶

Sec. 211. Contributory Negligence.

The duty to use reasonable care is reciprocal and the servant of a contractor can not recover for injuries the result of an accident to which his negligence contributed, *e. g.*, where the servant of an ice company, employed to ice cars, ventured onto the roof of a car to be iced at a time when it was slippery with ice, and it was held he assumed the danger of an obvious risk.⁴⁷ An employee of a contractor may become a trespasser by venturing on premises to which he has not been invited, as where a painter on a freight depot, without any invitation from the railroad company, attempted to cross between the parts of a broken train and was injured by their suddenly coming together.⁴⁸

the elevated railroad company owed the duty of using reasonable care to prevent his being injured from exposure to unusual dangers not known to him that might be caused by the negligent running of the defendant's surface cars beneath the platform on which he was at work. *Wagner v. Boston, etc., R.* (1905), 188 Mass. 437; 74 N. E. 919.

⁴⁶ *Sack v. St. Louis Car Co.* (1905), 112 Mo. App. 476; 87 S. W. 79.

⁴⁷ *BAKER V. LOUISVILLE, ETC., CO.* (1901), 106 Tenn. 490; 61 S. W. 1029; 53 L. R. A. 474. Contributory negligence was imputed to a servant of a lime company working in a yard which was upon

uniformly recurring occasions given up to the business of switching cars, by a railroad company defendant, and who was on such occasions directed to cease work until the switching operations were completed, and who, notwithstanding notice that switching was in progress, voluntarily assumed a position of danger, where he was injured by being pinched between a car, which was suddenly moved, and a bumper. *Johnson v. Minneapolis, etc., R.* (1904), 140 Mich. 292; 103 N. W. 594.

⁴⁸ *Furey v. New York, etc., R.* (1902), 67 N. J. L. 270; 51 Atl. 505.

contractor can not be convicted of embezzlement simply as such.⁷

Sec. 216. Same, Relation of Parties.

In New York, one contracting with the State to enlarge the State's canal is answerable for any direct injury to an individual in the nature of a trespass; as by blasting rock, whereby a person lawfully at work on adjacent premises, is hurt. The contractor can not justify an act of this kind on the ground that he was the State's agent and proceeding under the immunity of public authority, for he was not an agent but was an independent contractor. But it is held that even though he were an agent of the State it would make no difference, for the State can not clothe its agents with immunity in the exercise of acts invasive of private right without formal legislative act.⁸ Mere advertisers, who are licensed to go onto the roof of a building to place advertisements upon a sign which is a fixture on the building and which does not belong to them such advertisers having no right of possession of any part of the building, are not liable for the signs falling from the building in a high wind.⁹

⁷ *Regina v. Hall* (1875), 13 Cox C. C. 49; *Regina v. Clifford* (1878), 3 New Zeal. J. R. (N. S.), 1.

⁸ *ST. PETER V. DENISON* (1874), 58 N. Y. 416; 17 Amer. Rep. 258. See, also, the following more or less analogous English cases: *Ward v. Lee* (1857), 7 El. & Bl. 426; *Clothier v. Webster* (1862), 12 C. B. (N. S.), 798; *Jones v. Bird* (1822), 5 Barn. & Ald. 837.

⁹ *REYNOLDS V. VAN BEUREN* (1898), 155 N. Y. 120; 49 N. E.

763; 42 L. R. A. 129. A contractor engaging to manufacture a certain article who constructed it so negligently that it broke and damaged adjacent property, was held liable for such damages, in *Erie City, etc., Works v. Barber* (1883), 102 Penn. St. 156. A livery stable keeper, and not one who hires a carriage, horses and driver from him is held, in *FRECKER V. NICHOLSON* (1907), 41 Colo. 12, 92 Pac. 224, 13 L. R. A. (N. S.), 1122, to be liable for

pany entered another's enclosed land and took materials therefrom for the construction of the highway, and by reason of the fence on the premises being left open, cattle entered and destroyed the crop thereon the contractor is the proper party defendant in an action for the damages.⁴

Where parties enter into a contract which is in itself lawful, and the contractor in carrying on his work, does anything injurious to another he alone is responsible.⁵ Contractors are neither entitled to the benefits conferred, nor subject to the burdens imposed, by statutes which, upon a reasonable construction, must be held applicable only to servants.⁶ Several cases have held that an independent

⁴ Crawford v. Maxwell (1842), 3 Humph. (Tenn.), 476.

⁵ Woodhill v. Great Western Railroad (1885), 4 U. C. C. P. 449. In an action against a contractor by a third person for injuries received by falling into a ditch dug by the defendant, the jury was instructed that if the defendant had control of the ditch he would be responsible for any negligence connected therewith, but if he was merely engaged to do the work under the superintendence and direction of another he was not liable, and this was held correct on appeal. Jessup v. Sloneker (1891), 142 Penn. St. 527; 21 Atl. 983. When the work of the construction, repair or alteration of a street railway track in a city's streets is authorized by law and excavations are made in such work which are to be kept open at night, the duty is incumbent on those performing the work under

a contract with the street railway company to exercise reasonable care to guard such excavations to protect those using the streets. Fox v. Wm. Wharton, etc., Co. (1900, N. J. L.), 7 Amer. Neg. Rep. 467. To the same effect: Tatje v. Frawley (1900, La.), 27 So. 339, cited in note, 7 Amer. Neg. Rep. 467.

⁶ Hardy v. Ryle (1829), 4 Mann. & R. 295; Macfie v. Hutchinson (1887), 12 Ont. Pr. Rep. 167; Ingram v. Barnes (1857), 7 El. & Bl. 115, 132. Cf., Sleeman v. Barrett (1864), 2 Hurl. & C. 934. An independent contractor cannot be considered the agent or servant of the person employing him, and hence the principle of *respondeat superior* cannot be interposed for the contractor's protection in a suit by a third person injured by his negligence. Fish v. Dodge (1862), 38 Barb. (N. Y.), 163.

Sec. 219. Same, Following Defective Plans, etc.

Where the contractor follows designs and plans furnished him by his employer, the liability is placed on the employer.¹³ A brick contractor has been held not liable where, notwithstanding the fact that the work was done in a workmanlike manner in accordance with the plans and under the direction of the architect, the building fell and caused the injuries complained of, by reason of a defect in the architect's plans, which was not known to the contractor.¹⁴ "If the negligence of a proprietor and not that of the contractor is the proximate cause of the injury, the former will be liable to the one injured. Thus, if a contractor merely engages to do a certain work on a building (*e. g.*, the brick-work) under the direction of the proprietor's agent (*e. g.*, the architect) and the building falls, in consequence of a defect in the plans furnished by the architect, the contractor will not be liable to the one injured, for this would reverse the rule (of *respondeat superior*) and make the inferior liable for the superior's acts."¹⁵ In case of plans so defective that even a person not skilled in architecture would know them to be dan-

¹³ Board, etc., v. Vickers (1900), 62 Kans. 25; 61 Pac. 391; Rector, etc., v. Paterson, etc., R. (1902), 68 N. J. L. 399; 53 Atl. 449, 1079; 16 Am. Neg. R. 614, n.

¹⁴ Daegling v. Gilmore (1868), 49 Ills. 248; 16 Am. Neg. Cas. 416. For liability of a steel company which has constituted another its agent, to put up a bridge out of material which it has contracted to furnish to the employees of such agent, for failure to take care to comply with the requirements of the contract, in so

far as is necessary for the safety of such employees, see Bross v. Carnegie Steel Co. (—), 28 Pitts. L. J. (N. S.), 318. Whether the floor of a building fell in consequence of its negligent construction by the contractors or by reason of its being overloaded with building materials, was held in an action against the contractor to be a question for the jury. Gardner v. Friedrich (1898), 25 App. Div. 521; 49 N. Y. Supp. 1077.

¹⁵ Thomps. Neg., Sec. 647.

Sec. 217. Same, Statutory Right.

A corporation authorized by statute to insure and also to inspect steam boilers and stationary engines and to issue certificates stating their maximum working pressure, which certificates should be accepted by the city's chief inspector, was held liable to a third person from a negligent inspection and a false certificate.¹⁰

Sec. 218. Same, Negligent Performance of Work.

Where an injury springs from the negligent manner in which the contractor has executed the work, and not from the fact of the work being wrongful *per se*, the contractor will be primarily liable and it is immaterial whether he be deemed an independent contractor or a servant.¹¹ Where a ditch contractor so negligently constructed a ditch that instead of draining water off the plaintiff's land, it carried water onto the land, the contractor is liable for the damages resulting from his negligent act.¹²

injuries to a third person by the negligence of the driver, where the hirer exercises no control over the latter other than telling him in a general way where to go.

¹⁰ Bradley v. Hartford, etc., Insurance Co. (1883), 19 Fed. 246. An English statute regulating the construction of certain public works provided a special mode of assessing damages to land; a contractor of the public board having such work in charge was nevertheless liable to pay damages sustained by an occupier, in consequence of his negligence and want of skill. Clothier v. Webster (1862), 12 C. B. (N. S.), 790. Cf., Lawrence v. Great Northern R. (—), 16 Q. B. 643; Brine

v. Great Western R. (1862), 2 Best. & S. 402; Bartlett v. Baker (1864), 3 Hurls. & C. 153; 34 L. J. Exch. 8.

¹¹ Kollock v. Madison (1893), 84 Wisc. 458; 54 N. W. 725. For irrelevant discussion as to whether wrong-doer was servant or independent contractor, see Charlock v. Freel (1891), 125 N. Y. 357; 26 N. E. 262.

¹² Fromme v. Ide (1891), 14 N. Y. Supp. 802; (1893), 23 N. Y. Supp. 56; (1895), 144 N. Y. 630; 39 N. E. 493. Cf., Pasquini v. Lowry (1892), 63 Hun (N. Y.), 632; 18 N. Y. Supp. 284; Geer v. Darrow (1891), 61 Conn. 230; 23 Atl. 1087.

Sec. 221. Same, Injury to Wrong-doer.

The obligation of an independent contractor to trespassers and licensees on the premises on which he is at work is no greater than that of the property owner, though the trespasser or licensee is the servant of the proprietor; his own duty, it is said, is to refrain from doing any willful injury and from setting traps.²¹ Contractors employed in constructing a railroad can not avoid their liability to a third person working on the same road, who is injured by their negligence, by claiming that the right of way on which he was working was their own.²²

Sec. 222. Same, Injury to His Own Servant.

The fact that the proprietor may be liable does not necessarily negative the conclusion that the contractor is liable. The general rule will be that the independent contractor will occupy the relation of master and servant as between himself and his own employees and that such employees will not be regarded as servants of the proprietor. It must follow that in any such case of a negligent injury, where the proprietor becomes liable on the ground that the negligence is that of an independent contractor or his servants, the contractor will be liable.²³

²¹ *Blackstone v. Chelmsford, etc., Co.* (1898), 170 Mass. 321; 49 N. E. 635.

²² *Cameron v. Vandegriff* (1892), 53 Ark. 381; 13 S. W. 1092.

²³ *Charlock v. Freel* (1891), 125 N. Y. 357; 26 N. E. 262; *Doran v. Flood* (1891), 47 Fed. 543; *Geer v. Darrow* (1891), 61 Conn. 220; 23 Atl. 1087; *Wilson v. Chicago* (1890), 42 Fed. 506. A corporation erecting a building

for the owner, under a percentage contract by which it is to furnish materials and labor and be paid its cost with a percentage added, is an independent contractor and is liable for an injury to one of the laborers so employed and paid by such corporation caused by the negligence of the foreman of such corporation. *Whitney, etc., Co. v. O'Rourke* (1898), 172 Ills. 177; 50 N. E. 242. A contractor em-

gerous, the independent contractor might be liable for injuries occasioned by complying with them.¹⁶ Hence, one contracting for the construction of a lift bridge and agreeing to pay all legal damages caused by negligence in guarding it during construction, is liable for the death of one falling through an unguarded hole left in the floor of the adjacent viaduct after the removal therefrom of a derrick by a subcontractor undertaking the construction work, since the work required by the contract necessarily rendered the viaduct unsafe.¹⁷

Sec. 220. Same, Acts of Employer.

When building material is hauled onto the ground by the owner of the property, the contractor does not become liable for injuries caused by defective piling until he has taken control of the timbers and entered upon the erection of the structure.¹⁸ In a recent Illinois case building-owners are held liable for the death of a contractor's servant, who, while at work removing a stack from the building and exercising due care for his safety, broke through the roof and was killed, the accident being due to a hidden defect of which the owners knew but of which they failed to warn him.¹⁹ A person who built a bridge on a railroad company's land for the company's use in transporting baggage from its station to his hotel and to another railroad, was held not liable for a personal injury caused by the bridge getting out of repair.²⁰

¹⁶ Daegling v. Gilmore, *supra*; Peyton v. Richards (1856), 11 La. Ann. 62; Horner v. Nicholson (1874), 56 Mo. 220.

¹⁷ Chicago, etc., R. v. LaMantia (1904), 112 Ills. App. 43.

¹⁸ MacDonald v. O'Reilly (1904), 45 Ore. 589; 78 Pac. 753.

¹⁹ SPRINGFIELD LIGHT, ETC., Co.

v. CALVERT (1907), 231 Ills. 290; 83 N. E. 184; 14 L. R. A. (N. S.), 782.

²⁰ Watson v. Oxanna Land Co. (1891), 92 Ala. 320; 8 So. 770. See, generally, as to employer reserving control or interfering, Chap. VI., *ante*.

on the building are liable in damages to the employees of such other contractor if they are injured in consequence of the scaffolding having been defectively constructed.²⁶ Where a contractor, being short of laborers, borrowed a gang of men from a third party, and under such third party's foreman one of such laborers was put in a dangerous place at which he was injured, the contractor and the third party were both held liable.²⁷ Where an engineer of a train collided with a car negligently left upon a crossing by contractors of another company, he was held entitled to recover against the contractors.²⁸

Sec. 224. Same, Injury to Vendee's Servant.

"As a general rule, a contractor, manufacturer or vendor is not liable to third parties, who have no contractual relations with him for negligence in the construction, etc., of the articles which he handles, whereby such parties are injured. Such was the principle applied in the following cases with respect to the articles furnished:"²⁹ A defective chain furnished to draw stone;³⁰ an improperly hung chandelier;³¹ a defective valve in an oil-car;³² a defective

²⁶ *Hoffner v. Prettyman* (1897), 6 Pa. Super. Ct. 20. A contractor erecting a scaffold for his own work is not liable for the death, due to its unsafe construction, of an employee of another contractor, who goes thereon without invitation, express or implied, for the purpose of accomplishing the work of his own employer. *Maier v. Ferguson* (1892), 17 N. Y. Supp. 349.

²⁷ *Rook v. New Jersey, etc., Works* (1894), 76 Hun (N. Y.), 54; 27 N. Y. Supp. 623. See, also, *Jehle v. Ellicott, etc., Co.* (1898),

31 App. Div. (N. Y.), 336; 52 N. Y. Supp. 366.

²⁸ *Albert v. Sweet* (1889, N. Y.), 42 Am. & Eng. Ry. Cas. 216; 22 N. E. 762.

²⁹ Note to *EARL v. LUBBOCK* (1905), 1 K. B. 253, in 1 Amer. & Eng. Anno. Cas. 756, citing the cases referred to in the following notes.

³⁰ *Blakemore v. Bristol, etc., R.* (1858), 8 El. & Bl. 1035.

³¹ *Collis v. Selden* (1868), L. R., 3 C. P. 495.

³² *Goodlander v. Standard Oil Co.* (1894), 63 Fed. 401.

Sec. 223. Same, Between Contractors and Their Servants.

The question of the liability of a contractor to do iron-work on a building for damages caused by the negligence of his servants in removing and failing to replace certain braces, erected by a contractor of the mason-work, to sustain a wall, the wall being blown down by a wind of extraordinary violence, arose where the contractor for the mason-work, on quitting work on Saturday, left the work properly braced and not returning to work until Monday afternoon, he failed to examine the braces, and it was held that the iron contractor was not liable by reason of such failure to examine since he was not bound to anticipate their removal by the other contractor.²⁴ A person in the employ of one contractor in working on a railroad, is not deprived of the right to recover for a personal injury visited on him by the negligence of another contractor in blasting, by reason of the fact that his own employer failed to notify him a blast would be fired.²⁵ Building contractors employed to erect a scaffold to be used by the employees of an independent contractor, having work to do

employing laborers in and about his work is liable to his employees for any injury sustained by them in the prosecution thereof, the injury being the result of his negligence or that of his agent. *Sullivan v. Louis, etc., Co.* (1872), 9 Bush (Ky.), 81; 15 Amer. Neg. Cas. 147.

²⁴ *Pasquini v. Lowery* (1892), 18 N. Y. Supp. 284; 63 Hun, 632. Where the cap blows out of the end of a steam supply pipe which is being put in by one contractor and injures the servant of another contractor, the owner of the building is not liable, if the accident

is due to poor material, defective workmanship or bad management. *Jones v. Philadelphia Traction Co.* (1898), 185 Penn. 75; 39 Atl. 889.

²⁵ *Cameron v. Vandegriff* (1892), 53 Ark. 381; 13 S. W. 1092. For circumstances under which the question whether or not the driver of a horse by which an elevator was operated was guilty of negligence rendering his employer, a subcontractor, liable for injuries to the servants of another subcontractor, see *Eckman v. Lauer* (1897), 67 Minn. 221; 69 N. W. 893.

by him because of the failure of the contractor properly to inspect and repair one of the vans.⁴⁸

As long as an elevator or other machine is under the control of and being operated by the manufacturer or vendor, the latter is liable for injuries to third persons, irrespective of any privity of contract between the parties.⁴⁹ In a number of cases it has been held that elevator companies which place elevators in buildings, under contracts with the owners guaranteeing their safety, are not liable for injuries resulting to third persons from defects in the same.⁵⁰

Sec. 225. Same, Condition of Employer's Premises.

The contractor, on his part, having possession of his employer's premises is required to exercise a reasonable degree of care with reference to the employees of the owner of the premises engaged in necessary work thereon.⁵¹

⁴⁸ *EARL v. LUBBOCK* (1905), 1 K. B. 253; 1 Amer. & Eng. Annot. Cas. 753, citing and following *Winterbottom v. Wright* (1842), 10 Mees. & W. 109.

⁴⁹ *Empire, etc., Co. v. Brady* (1896), 164 Ills. 58; *Necker v. Harvey* (1883), 49 Mich. 518; *PITTSFIELD, ETC., Co. v. PITTSFIELD, ETC., Co.* (1902), 71 N. H. 522; 53 Atl. 807; 60 L. R. A. 116; 50 Amer. St. Rep. 313; *Cox v. Mason* (1903), 89 N. Y. App. Div. 219.

⁵⁰ *Field v. French* (1898), 80 Ills. App. 78; *Simons v. Gregory* (1905, Ky.), 85 S. W. 751; *Necker v. Harvey*, *supra*; *Zieman v. Kieckhefer Elevator Co.* (1895), 90 Wisc. 497; 63 N. W. 1021. *Contra*, *Kahner v. Otis Elevator*

Co. (1904), 96 N. Y. App. Div. 169; 89 N. Y. Supp. 185.

⁵¹ *Kitchen v. Riter-Conley, etc., Co.* (1904), 207 Penn. St. 558; 56 Atl. 1083; *Gile v. J. W. Bishop Co.* (1903), 184 Mass. 413; 68 N. E. 837. For circumstances under which a contractor was exonerated from liability for the death of a painter, employed by the owner of the building, who was killed by falling from a high scaffold, erected by the contractor's employee, see *Maguire v. Magee* (1888, Penn.), 13 Atl. 551. Although the relation of master and servant does not exist between a master stevedore and the member of a vessel's crew, yet there is an implied obligation resting upon

side-saddle;³³ a defective wall which fell on a pedestrian;³⁴ a railroad car supplied with defective brakes;³⁵ a defective cylinder in a threshing machine;³⁶ a defective bridge;³⁷ a defective rim in a balance wheel;³⁸ a defective steam boiler;³⁹ a defective land roller;⁴⁰ a defective rope on a derrick;⁴¹ a defective shelf for a workman to stand on in placing ice in a box;⁴² a defective hoisting rope of an elevator;⁴³ shelves in a dry goods store whose fall injured a customer;⁴⁴ a porch on a hotel;⁴⁵ a defective hook holding a heavy weight in a drop press;⁴⁶ defective wheels.⁴⁷ A master wheelwright who contracts to keep in repair a number of vans owned by a firm is under no duty to a driver employed by the firm, and hence is not liable in damages to such driver for the personal injuries sustained

³³ *Bragdon v. Perkins, etc., Co.* (1898), 87 Fed. 109.

³⁴ *DAUGHERTY v. HERZOG* (1896), 145 Ind. 255; 44 N. E. 457; 57 Amer. St. Rep. 204; 32 L. R. A. 837.

³⁵ *RODDY v. MISSOURI, ETC., R.* (1891), 104 Mo. 234; 15 S. W. 1112; 12 L. R. A. 746; 24 Amer. St. Rep. 337.

³⁶ *HEIZER v. KINGSLAND, ETC., Co.* (1892), 110 Mo. 605; 19 S. W. 630; 33 Amer. St. Rep. 482; 15 L. R. A. 821; *Huset v. Case, etc., Co.* (1903), 120 Fed. 865.

³⁷ *Marvin, etc., Co. v. Ward* (1883), 46 N. J. L. 19.

³⁸ *LOOP v. LITCHFIELD* (1870), 42 N. Y. 351; 1 Amer. Rep. 543.

³⁹ *LOSEE v. CLUTE* (1873), 51 N. Y. 494; 10 Amer. Rep. 638; *Chase Cas. Torts* (Supp.), 14.

⁴⁰ *Kuelling v. Roderick, etc., Co.*

(1903), 88 N. Y. App. Div. 309; 84 N. Y. Supp. 622.

⁴¹ *Burke v. DeCastro, etc., Co.* (1877), 11 Hun (N. Y.), 354.

⁴² *Swan v. Jackson* (1889), 55 Hun (N. Y.), 194; 7 N. Y. Supp. 821.

⁴³ *Barrett v. Singer, etc., Co.* (1865), 1 Sweeny (N. Y.), 545.

⁴⁴ *BURDICK v. CHEADLE* (1875), 26 Ohio St. 393; 20 Amer. Rep. 767.

⁴⁵ *CURTIN v. SOMERSET* (1891), 140 Penn. St. 70; 21 Atl. 244; 12 L. R. A. 322; 23 Amer. St. Rep. 220.

⁴⁶ *McCAFFREY v. MOSSBERG, ETC., Co.* (1901), 23 R. I. 381; 50 Atl. 651; 91 Amer. St. Rep. 637; 55 L. R. A. 822.

⁴⁷ *Case, etc., Works v. Niles, etc., Co.* (1895), 90 Wisc. 590; 63 N. W. 1013.

Sec. 228. Same, Acceptance by Employer.

An independent contractor is not liable for injuries to a third person, occurring after the contractor has completed the work and turned it over to the owner or employer and the same has been accepted by him, though the injury result from the contractor's failure to properly carry out his contract.⁵⁵ In a note to the case referred to, it is stated: "That an independent contractor having a contract for the doing of work, is not, as a general rule, liable for an injury to the person or property of one not a party to the contract, occurring after the contractor has completed the work and has turned it over to the owner or employer and the same has been accepted by him, though the injury result from the contractor's failure properly to carry out his contract is, as stated in the reported case, well settled."⁵⁶ The contractor and not the owner is liable for injuries due to negligence in the removal of materials and appliances belonging to the contractor after the com-

for damages to furniture and effects therein, caused by their own negligence or that of their employees. *McDonald v. Morrison* (1898), 15 Queb. Sup. Ct. 143.

⁵⁵ *YOUNG v. SMITH, ETC., Co.* (1905), 124 Ga. 475; 4 Amer. & Eng. Anno. Cas. 226; 14 Am. Neg. R. 132, per Fish, C. J. See Sec. 177, *ante*.

⁵⁶ 4 Amer. & Eng. Anno. Cas. 228, citing *Winterbottom v. Wright* (1842), 10 Mees. & W. 109; *Heaven v. Pender* (1883), 11 Q. B. D. 506; *SALLIOTTE v. KING, ETC., Co.* (1903), 122 Fed. 378; 58 C. C. A. 466; 65 L. R. A. 620; 16 Am. Neg. R. 615, n; *Albany v. Cunliff* (1849), 2 N. Y. 165; *DAUGHERTY v. HERZOG* (1896), 145

Ind. 255; 44 N. E. 457; 57 Amer. St. Rep. 204; 32 L. R. A. 837; *CURTIN v. SOMERSET* (1891), 140 Penn. St. 70; 21 Atl. 244; 12 L. R. A. 322; 23 Amer. St. Rep. 220; *Fitzmaurice v. Fabian* (1892), 147 Penn. St. 199; 23 Atl. 444; *FIRST PRESBYTERIAN CHURCH v. SMITH* (1894), 163 Penn. St. 561; 30 Atl. 279; 43 Amer. St. Rep. 808; 26 L. R. A. 504; 39 Cent. Law J. 452. "Where the work is turned over by the contractor so negligently defective as to be imminently dangerous to third persons," the contractor is liable. 4 Amer. & Eng. Anno. Cas. 229, citing *DEVLIN v. SMITH* (1882), 89 N. Y. 470; 42 Amer. Rep. 311.

Sec. 226. Contractor's Legal Representatives.

There is no right of action against the personal representatives of a deceased contractor who engaged to erect a building that would bear a stipulated weight, the contractor having died before completing the building, where, after his death, it fell under a less weight and injured another's building, the fall being occasioned by the use to which it was put after the contractor's death and not by the defective construction of the wall by the deceased contractor.⁵²

Sec. 227. Same, Injury to Employer's Tenant.

One contracting with a landlord to heat a building is liable in tort for the breach of a legal duty to a tenant for damage to him proximately arising from the bursting of a water pipe due to freezing because of his negligence in permitting the fires to go out.⁵³ A contractor employed to replace an old elevator with a new one has been held liable for injuries to a boy employed by a telegraph company, having a right to use a hall in the building, from falling over materials left in the hall by such contractor, without lights or suitable safeguards, in reliance upon the lighting of the hall by the owner of the building.⁵⁴

the former to keep the machinery used by him in a reasonably safe and secure condition and to operate the same carefully so as not to injure members of the crew engaged about the vessel; failure to do so renders the stevedore liable to the latter. *Minor v. Clark* (1889), 8 N. Y. Supp. 616. Plaintiff, a hotel dish washer, was required by his employer to go upon the hotel roof to assist in placing signs there and was injured by being shocked by coming

in contact with defendant's wires negligently fixed on the roof. *Giraudi v. Electric, etc., Co.* (1895), 107 Cal. 120; 13 Amer. Neg. Cas. 517, n.

⁵² *Methodist Episcopal Church v. Rensh* (1857), 7 Ohio St. 369.

⁵³ *PITTSFIELD, ETC., Co. v. PITTSFIELD, ETC., Co.* (1902), 71 N. H. 522; 53 Atl. 807; 60 L. R. A. 116.

⁵⁴ *Crane Elevator Co. v. Lippert* (1894), 63 Fed. 942; 11 C. C. A. 521. Contractors who make repairs on a house are responsible

tractor has assumed no duty to third persons, but only to the other contracting party. The contract does not draw him into privity with the stranger to it; although if, while executing the contract, he commits an injury upon a stranger, he may be liable to him in damages, but as a mere tortfeasor and independently of the contract.”⁶³ The general rule exempting a contractor from liability after the work is turned over and accepted by the proprietor, is subject to the qualifications that the contractor continues liable where the work is a nuisance *per se* and where it is turned over by the contractor in a manner so negligently defective as to be imminently dangerous to third persons.⁶⁴ If a contract to build a fence along a railroad required by statute is made with the plaintiff, and he fails in its performance he can not, of course, recover for an injury to his stock resulting from a defect consequent on such failure; in such a case he is guilty of contributory negligence. But if he originally created the fence under such a contract, and it was accepted by the railroad company and paid for, the company can not afterwards plead a defective construction as contributory negligence, for by the acceptance they assume responsibility for the defect.⁶⁵

⁶³ Thomps. Neg., Sec. 687. In a leading English case, the defendant had contracted with the postmaster-general to provide mail coaches for a certain post route. A third party contracted to provide the horses for the coaches along the same route and he also employed the plaintiff as one of its drivers. The plaintiff was injured by some defect in the coach, the fault of the defendant. It was held that the defendant was not liable to the plaintiff. Win-

terbottom v. Wright (1842), 10 Mees. & W. 109.

⁶⁴ Thomps. Neg., Secs. 652, 820.

⁶⁵ MORRIS v. ANDROSCOGGIN R. Co. (1855), 39 Me. 274; 63 Amer. Dec. 621.

⁶⁶ Pfau v. Williamson (1873), 63 Ills. 16. A contractor engaged to repair a roof, by whose negligence the goods of the tenant are damaged, is liable over to the landlord for a reasonable amount paid by him to the tenant in settlement. Maloney v. Bradley

pletion of the work, in which act of removal the proprietor does not participate.⁵⁷

But the work must be completed; it is not enough that the time fixed for its completion, according to the contract, has expired.⁵⁸ The rule in this connection does not require a *formal* acceptance of the work done by the contractor. The liability of the contractor will cease with a *practical* acceptance after completion of the work. Thus, where a stand-pipe for a municipality collapsed, thereby flooding the plaintiff's lands prior to its formal acceptance but after the municipality had filled it with water, the municipality was held liable.⁵⁹ Where an accident occurred after a bridge was completed and turned over to and accepted by the owners, the independent contractor was not liable to the one injured.⁶⁰ Where a traveler was injured by the fall of material from a roof after a contractor employed to repair it had completed his contract, the contractor was held not answerable.⁶¹ As between a contractor and third persons, the contractor is not liable where the injuries complained of resulted after the work had been completed and turned over to the owner.⁶²

"The obvious reason" why a contractor is no longer liable to third persons after the work is completed and turned over and accepted "is that by his contract, the con-

⁵⁷ Swart v. Justh (1904), 24 App. (D. C.), 596.

⁵⁸ Blackstone v. Chelmsford, etc., Co. (1898), 170 Mass. 321; 49 N. E. 635.

⁵⁹ READ v. EAST PROVIDENCE, etc., Co. (1898), 20 R. I. 574; 4 Amer. Neg. Rep. 589; 40 Atl. 760. See, also, DAUGHERTY v. HERZOG (1896), 145 Ind. 255; 44 N. E. 457; 32 L. R. A. 837; 57 Amer. St. Rep. 204.

⁶⁰ SALLIOTTE v. KING, etc., Co. (1903), 122 Fed. 378; 58 C. C. A. 466; 65 L. R. A. 620; 16 Am. Neg. R. 615, n.

⁶¹ Khron v. Block (1887), 144 Mass. 516; 11 N. E. 748.

⁶² CURTIN v. SOMERSET (1891), 140 Penn. St. 70; 21 Atl. 244; 23 Amer. St. Rep. 220; 12 L. R. A. 322; Fitzmaurice v. Fabian (1892), 147 Penn. St. 199; 23 Atl. 444; DAUGHERTY v. HERZOG, *supra*.

sioned by the negligence of X. in performing the work he had engaged to do.”⁶⁸

Sec. 230. Subcontractors.

The subcontractor is liable to third persons and over to his superior contractor, in those cases in which, under similar circumstances, the superior contractor is himself liable to his employer or to third persons.⁶⁹ Obviously if the subcontractor, by his negligence, injures the owner's property, he thereby becomes liable to such owner for damages, and this wholly without reference to whether he is to be regarded as an independent contractor or a subcontractor or as a servant of the chief contractor or of the owner or as a mere stranger.⁷⁰

One who takes an independent contract to perform a portion of the work which his employer has undertaken to do is responsible for injuries caused to the employer's servant by his negligent use of appliances in the performance of his work.⁷¹ Merely because the wrong-doer is a subcontractor does not *per se* render the primary contractor liable.⁷²

When both contractor and subcontractor are negligent

⁶⁸ KAMPMAN v. ROTHWELL (1908, Tex.), 109 S. W. 1089; 17 L. R. A. (N. S.), 758. The work here was repairing a defective cement sidewalk previously constructed by X. and leaving it unguarded.

⁶⁹ Holt v. Whatley (1874), 51 Ala. 569.

⁷⁰ BICKFORD v. RICHARDS (1891), 154 Mass. 163; 27 N. E. 1014; 26 Amer. St. Rep. 224.

⁷¹ MILLER v. MORAN, ETC., Co. (1905), 39 Wash. 631; 81 Pac. 1089; 1 L. R. A. (N. S.), 283.

An original contractor sublet part of the work to an independent subcontractor and informed him he had the legal right to go on the land; the landowner's daughter resisted and was injured; the original contractor was held not liable. Slingerland v. East Jersey, etc., Co. (1896), 58 N. J. L. 411; 33 Atl. 843.

⁷² Overton v. Freeman (1852), 11 C. B. 867; 9 Am. Neg. R. 122, n.

Sec. 229. Same, Indemnity to the Employer.

If the employer has had to pay damages on account of the contractor's negligence, he may recover them from the contractor.⁶⁶ A bond given the employers provided that the contractors "shall protect and keep harmless the said (employers) . . . from damages arising from accidents to persons employed in the construction of, or passing near, the said work;" and in construing it the court held there could be no doubt that the damages contemplated were such as would be done by the contractors or their employees and not by the employer or his employees. The employer had been held liable for negligence resulting in injury to one of the contractor's servants and in a suit for reimbursement on the bond in question the court held the contractor not liable to the employer.⁶⁷ "Whether X. was an independent contractor or servant of the property owner, he is liable for any sum which such owner may be compelled to pay on account of injuries to plaintiff occa-

(1891), 18 N. Y. Supp. 757. Where mail contractors negligently obstructed a sidewalk affording access to a station whereby a passenger was injured, who recovered a judgment against the railroad company, the contractors were held liable to indemnify the company. *Old Colony R. Co. v. Slavens* (—), 148 Mass. 363; 19 N. E. 372; 12 Amer. St. Rep. 558.

⁶⁷ *PERRY v. PAYNE* (1907), 217 Penn. 252; 66 Atl. 553; 11 L. R. A. (N. S.), 1173, 1176; 10 Am. & Eng. Anno. Cas. 589, citing *MYNARD v. SYRACUSE, ETC.*, R. (1877), 71 N. Y. 180; 27 Amer. Rep. 28; *Mitchell v. Southern R.*

(1903), 24 Ky. L. R. 2388; 74 S. W. 216; *PERKINS v. NEW YORK, ETC.*, R. (1862), 24 N. Y. 196; 82 Amer. Dec. 281; *Manhattan Railroad v. Cornell* (1891), 130 N. Y. 637; 29 N. E. 151; *Johnson v. Richmond, etc.*, R. (1890), 86 Va. 975; 11 S. E. 829, distinguishing *Woodbury v. Post* (1893), 158 Mass. 140; 33 N. E. 86. See, also, in support of the rule, *Morton v. Union Traction Co.* (1902), 20 Pa. Super. Ct. 325; *St. Louis, etc.*, R. v. *Arnold* (1903), 32 Tex. Civ. App. 272; 74 S. W. 819; *New York v. Brady* (1893), 70 Hun (N. Y.), 250; 24 N. Y. Supp. 296.

contractor and his subcontractor as well.⁷⁷ In general, the servants of a subcontractor can not recover from the principal contractor damages for injuries resulting from the negligence of their immediate superior, the subcontractor, where the principal contractor has no control over the subcontractor as to the manner of doing his work.⁷⁸ The mere fact that a scaffolding, the fall of which caused the injuries to a workman for which recovery was had against a subcontractor, was built by a contractor, did not render the latter liable to the subcontractor, where he was under no contract to furnish scaffolding for such workmen.⁷⁹ "In cases where the person injured has been invited, expressly or impliedly, to use the article causing the injury the person extending the invitation may be held liable even though privity of contract does not exist. It is upon this principle that owners of buildings, or contractors who have constructed scaffolds for the use of subcontractors, have been held liable to the servants of the latter for injuries resulting from defective and negligent construction."⁸⁰

⁷⁷ *Slater v. Mersereau* (1876), 64 N. Y. 138.

⁷⁸ *Mohr v. McKenziem* (1895), 60 Ills. App. 575. It has been well reasoned by a Pennsylvania Common Pleas Court that liability for negligence cannot be shifted from the contractor to an alleged subcontractor, unless the latter assumed the entire charge and control of the work; and, further, that where one is chosen for the purpose of enabling the proprietor to escape liability, he ought not to be regarded in law as an independent contractor or subcontractor. *Fox v. Porter* (1895), 18 Pa. Co. Ct. 641.

⁷⁹ *Sincer v. Bell* (1895), 47 La. Ann. 1548; 18 So. 755.

⁸⁰ *EARL V. LUBBOCK* (1905, 1 K. B. 253), in 1 Amer. & Eng. Anno. Cas. 756, citing *DEVLIN V. SMITH* (1882), 89 N. Y. 470 (Earl, J., dissenting), 42 Amer. Rep. 311; *COUGHTRY V. GLOBE, ETC., Co.* (1874), 56 N. Y. 124; 15 Amer. Rep. 387; *BRIGHT V. BARNETT, ETC., Co.* (1874), 88 Wisc. 299; 60 N. W. 418; 26 L. R. A. 524. "But see *Maguire v. Magee* (Pa., 1888), 13 Atl. 551." If the relation of master and servant exists between the contractor and subcontractor, the former is liable for the negligence of the latter,

and the damage can not be distinguished, each is liable for the whole.⁷³ A principal contractor who receives a structure in defective condition from a subcontractor makes it his own work and is jointly liable with the subcontractor for injuries caused by its defects.⁷⁴ If the materials furnished by a contractor for a wall or the work done by him were such that the wall was unsafe and unfit for its intended purpose and the principal contractor knew this or by exercising reasonable care might have known it, and went on and made use of the wall, and incorporated his own work on it, made payments to the subcontractor and accepted the work as it progressed; and if in consequence of the character of material furnished and work done by the subcontractor the building fell upon and injured plaintiff's premises, the principal contractor is liable therefor.⁷⁵ It is held that it is the duty of an independent contractor, for the construction of a building and not of the owner, to furnish subcontractors and their subordinates a truthful copy of the plans and specifications, as approved, for their guidance.⁷⁶ The doctrine that the proprietor is liable when full control is retained, applies as between the independent

⁷³ *VAN STEENBURGH v. TOBIAS* (1837), 17 Wend. (N. Y.), 562; 31 Amer. Dec. 310; *Partenheimer v. VanOrder* (1855), 20 Barb. (N. Y.), 479.

⁷⁴ *Carey v. Courcell* (1865), 17 La. Ann. 108, distinguishing *Peyton v. Richards* (1856), 11 La. Ann. 62, as being a case in which the work had not yet been delivered.

⁷⁵ *Bast v. Leonard* (1870), 15 Minn. 304. As between the contractor and the subcontractor, the duty of shoring a building is held

to rest on the former in the absence of contrary proof. *Nelson v. Young* (1904), 180 N. Y. 523; 72 N. E. 1146. The principal contractor was held liable where the property of an abutting owner was damaged as a result of the grading of a street by a municipal corporation. *Sewall v. St. Paul* (1874), 20 Minn. 511. See other cases cited in 65 L. R. A. 750.

⁷⁶ *Hawke v. Brown* (1898), 50 N. Y. Supp. 1032.

otherwise the responsibility rests solely on the subcontractor, and this general rule is subject to the same exceptions that modify it in its application between employer and contractor. Thus, if one authorizes the doing of an unlawful act, the responsibility therefor attaches to him, no matter what subcontractor or deputy may have actually committed the wrong or injury; as if one, without special authority, makes an excavation in the sidewalk of a public street whereby a pedestrian is injured, he is liable, although the injury was caused by the negligence of a subcontractor in not properly guarding the excavation. Barrows on Neg., pp. 166-7, citing *CREED v. HARTMAN* (1864), 29 N. Y. 591; 86 Amer. Dec. 341. "See, also," *Overton v.*

Freeman (1853), 11 C. B. 867; 9 Am. Neg. Rep. 122, n. In a very recent Minnesota case, plaintiff was employed by a building contractor; the servants of defendant, a roofing subcontractor, using the contractor's large planks with his consent were about to take them down from the girders whereon they rested to the floor below; one of them saw plaintiff coming and called to him to remove his wheelbarrow and plaintiff went to do so when a plank fell on him, injuring him, and it was held that the verdict that he was rightfully there should not be disturbed and that defendant was guilty for his servant's tort. *KELLY v. TYRA* (1908), 103 Minn. 176; 114 N. W. 750; 17 L. R. A. (N. S.), 334.

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